REPORT
OF THE
UNITED NATIONS COMMISSION
ON
INTERNATIONAL TRADE LAW
on the work of its twenty-fourth session

---

10 – 28 June 1991

GENERAL ASSEMBLY

OFFICIAL RECORDS: FORTY-SIXTH SESSION
SUPPLEMENT No. 17 (A/46/17)

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NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

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INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's twenty-fourth session, held at Vienna from 10 to 28 June 1991.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development (UNCTAD).

I. ORGANIZATION OF THE SESSION

A. Opening of the session

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its twenty-fourth session on 10 June 1991.

B. Membership and attendance

4. General Assembly resolution 2205 (XXI) established the Commission with a membership of 29 States, elected by the Assembly. By resolution 3108 (XXVIII), the General Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 10 December 1985 and 19 October 1988, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated: 1/

> Argentina (1992), Bulgaria (1995), Cameroon (1995), Canada (1995), Chile (1992), China (1995), Costa Rica (1995), Cuba (1992), Cyprus (1992), Czechoslovakia (1992), Denmark (1995), Egypt (1995), France (1995), Germany (1995), Hungary (1992), India (1992), Iran (Islamic Republic of) (1992), Iraq (1992), Italy (1992), Japan (1995), Kenya (1992), Lesotho (1992), Libyan Arab Jamahiriya (1992), Mexico (1995), Morocco (1995), Netherlands (1992), Nigeria (1995), Sierra Leone (1992), Singapore (1995), Spain (1992), Togo (1995), Union of Soviet Socialist Republics (1995), United Kingdom of Great Britain and Northern Ireland (1995), United States of America (1992), Uruguay (1992) and Yugoslavia (1992).

5. With the exception of Costa Rica, Cyprus, Iraq, Kenya, Lesotho, Sierra Leone, Togo and Uruguay, all members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Australia, Austria, Bolivia, Botswana, Brazil, Byelorussian Soviet Socialist Republic, Colombia, Democratic People's Republic of Korea, Ecuador, Finland, The Holy See, Indonesia, Israel, Malaysia, Myanmar, Namibia, Oman, Pakistan, Panama, Peru, Philippines, Poland, Qatar, Republic of Korea, Saudi Arabia, Sudan, Sweden, Switzerland, Thailand, Turkey, Uganda, Ukrainian Soviet Socialist Republic, Viet Nam, Yemen and Zaire.

7. The session was also attended by observers from the following international organizations:

(a) United Nations organs

International Monetary Fund

(b) Intergovernmental organizations

Bank for International Settlements
Commission of the European Communities
Hague Conference on Private International Law

(c) Other international organizations

Argentine-Uruguayan Institute of Commercial Law
European Banking Federation
Society for Worldwide Interbank Financial Telecommunication

C. Election of officers 2/

8. The Commission elected the following officers:

Chairman: Mr. Kazuaki Sono (Japan)

Vice-Chairmen: Mr. José M. Abascal Zamora (Mexico)
Mr. Miroljub Savic (Yugoslavia)
Ms. Christiane Verdon (Canada)

Rapporteur: Mr. M. O. Adediran (Nigeria)

D. Agenda

9. The agenda of the session, as adopted by the Commission at its 439th meeting, on 10 June 1991, was as follows:

1. Opening of the session.
2. Election of the officers.
3. Adoption of the agenda.
4. International Payments: draft Model Law on International Credit Transfers.
5. New international economic order: draft Model Law on Procurement.
6. International contract practices: draft Uniform Law on Guarantees and Stand-by Letters of Credit.
7. Countertrade.
8. Decade of International Law.
9. Electronic Data Interchange.
10. INCOTERMS 1990.
11. Coordination of work.
12. Status of conventions.
13. Training and assistance.
14. General Assembly resolutions on the work of the Commission.

15. Other business.

16. Date and place of future meetings.

17. Adoption of the report of the Commission.

E. Adoption of the report

10. At its 466th meeting, on 28 June 1991, the Commission adopted the present report by consensus.

II. DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS

A. Introduction

11. The Commission, in conjunction with its decision at the nineteenth session in 1986 to authorize the Secretariat to publish the UNCITRAL Legal Guide on Electronic Funds Transfers (A/CN.9/SER.B/1) as a product of the work of the Secretariat, decided to begin the preparation of model rules on electronic funds transfers and to entrust the task to the Working Group on International Negotiable Instruments, which it renamed the Working Group on International Payments. 3/ The Working Group carried out its work at its sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first and twenty-second sessions. The Working Group completed its work by adopting the draft text of a Model Law on International Credit Transfers at the close of its twenty-second session after a drafting group had established corresponding language versions in the six languages of the Commission.

12. The text of the draft Model Law as adopted by the Working Group was sent to all Governments and to interested international organizations for comment. The Secretariat of the Commission also prepared a commentary on the draft text. The commentary was prepared on the basis of the English language version of the draft Model Law.

13. At its current session, the Commission had before it reports of the Working Group on International Payments on the work of its twenty-first and twenty-second sessions (A/CN.9/341 and A/CN.9/344, respectively), a report of the Secretary-General containing a compilation of comments by Governments and international organizations on the draft text of a Model Law on International Credit Transfers (A/CN.9/347 and Add.1) and a report of the Secretary-General containing a commentary on the draft Model Law prepared by the Secretariat (A/CN.9/346). The text of the draft Model Law presented by the Working Group to the Commission is contained in the annex to the report of the Working Group of its twenty-second session (A/CN.9/344).

14. The Commission expressed its appreciation to the Working Group on International Payments for having elaborated the draft text of a Model Law on International Credit Transfers that was in general favourably received and regarded as an excellent basis for the deliberations of the Commission.

B. Discussion of articles

Article 1

15. The text of draft article 1 as considered by the Commission was as follows:

"Article 1. Sphere of application*

"* This law does not deal with issues related to the protection of consumers."

"(1) This law applies to credit transfers where a sending bank and its receiving bank are in different States.

"(2) For the purpose of determining the sphere of application of this law, branches and separate offices of a bank in different States are separate banks."

Paragraph (1)

16. A suggestion was made that the Model Law should apply to all credit transfers regardless of whether a specific credit transfer could be split up into "international" or "domestic" segments. The test of internationality contained in paragraph (1) was said to be formalistic and therefore potentially under- or over-inclusive. The test of internationality also created operational problems in presuming that a receiving bank was cognizant of the geographic location of all sending banks earlier in the chain. Moreover, the division between international and domestic transfers was contrary to the goal of uniformity.

17. A concern was expressed that the definition as presently formulated would give rise to difficulties when both the originator's bank and the beneficiary's bank were located in the same State and a foreign intermediary bank was involved. It was suggested that the originator would not always be able to foresee the involvement of an intermediary bank in another State, an international element triggering application of the Model Law. Transfers of that kind should not be regarded as rare, particularly in view of the establishment of a single market by the European Economic Community and in view of the operations of global banks. The Commission noted that the Working Group had attempted to find an acceptable solution to that concern but had been unable to do so, in particular because of the need to promote as broad a sphere of application for the Model Law as possible. It was also noted that the problem of foreseeability in such cases was mitigated by the fact that an originating bank could specify the route that a credit transfer was to take.

18. One suggestion to address the concern was to modify the definition so as to allow exclusion from the Model Law of domestic segments of a credit transfer. Another suggestion was that enacting States where such credit transfers were likely to arise might consider using an approach analogous to that provided in article 94 of the United Nations Convention on Contracts for the International Sale of Goods. Under that provision, two or more Contracting States which have the same or closely related legal rules on matters governed by the Convention may declare that the Convention is not to apply to contracts of sale where the parties have their places of business in those States.

19. The Commission did not accept either suggestion. It was noted, however, that it might not be desirable for a State to have two different bodies of law governing credit transfers, one applicable to domestic credit transfers and the Model Law applicable to international credit transfers. In some countries there were no domestic credit transfers or the domestic elements of international transfers were segregated from purely domestic transfers. In other countries domestic credit transfers and the domestic elements of international transfers were processed through the same banking channels. It was suggested that in those countries it would be desirable for the two sets

of legal rules to be reconciled to the greatest extent possible or for the Model Law to be adopted for both domestic and international credit transfers. It was agreed that it should be made clear, by means of a footnote or in a commentary to the Model Law, that countries would have the option to adopt the provisions of the Model Law for both international and domestic credit transfers.

20. A suggestion was made that the Model Law should be limited to electronic transfers and thus be geared to high-speed, high-value credit transfers. The difference between such transfers and transfers that are paper-based or made by telex was said to lie not only in their speed, with its consequences on time-periods and notice requirements, but also in the value and volume of the transfers that created a totally different operating environment, with funds transfer systems acting as central data managers.

21. The Commission did not accept that suggestion, for the same reasons that had prevailed in the Working Group, namely: the difficulty of distinguishing clearly between electronic and other transfers, taking into account the fact that a given credit transfer may comprise segments of both types of communication; the difficulty of defining clearly high-speed, high-value transfers; the inappropriateness of expressing a preference for one technology over others in a rapidly developing area. It was pointed out that, where special features of certain credit transfers called for different rules, the provisions of draft article 3 on variation by agreement were of particular importance, especially in inter-bank relationships.

22. After deliberation, the Commission adopted paragraph (1) unchanged.

Paragraph (2)

23. A suggestion to replace the words "a bank" by the words "the same bank" was referred to the Drafting Group. Subject to this possible modification, paragraph (2) was adopted. In the subsequent discussion of the definition of a "bank", a new paragraph (2) was adopted and current paragraph (2) was renumbered paragraph (3) (see para. 62, below).

Footnote: Consumer transfers

24. A view was expressed that it was unclear whether the text of the footnote meant that the Model Law applied to consumers unless the internal laws of a particular State otherwise governed the transaction. As regards a possible conflict between the consumer protection laws of a State with provisions of the Model Law, the question was raised whether the Model Law might apply to part of a credit transfer while a State's consumer protection laws applied to other parts of the transaction. With a view to clarifying such issues, it was proposed to amend the footnote as follows:

> "The consumer protection laws of a particular State may further govern the relationship between the originator and the originator's bank, or between the beneficiary and the beneficiary's bank, within the State, but may not impair the rights of other parties to a credit transfer located in a different State, as provided in this law."

25. In reply, it was stated that the current footnote was clear and that the question that had been raised was to be answered in the affirmative. Moreover, the proposed amendment created new problems. For example, it would unduly confine the operation of consumer protection laws to relationships at the beginning and at the end of the transfer chain, and only within a given State, and exclude intermediary relationships. The Model Law should not appear to discourage States from enacting consumer protection legislation. After discussion, the Commission was agreed that the existing text was sufficiently clear and decided to maintain the footnote as currently drafted.

Article 2

26. The text of draft article 2 as considered by the Commission was as follows:

> "Article 2. Definitions
>
> "For the purposes of this law:
>
> "(a) 'Credit transfer' means the series of operations, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of a beneficiary. The term includes any payment order issued by the originator's bank or any intermediary bank intended to carry out the originator's payment order. [The term does not include a transfer effected through a point-of-sale payment system.]
>
> "(b) 'Payment order' means an unconditional instruction by a sender to a receiving bank to place at the disposal of a beneficiary a fixed or determinable amount of money if:
>
> > "(i) the receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender, and
> >
> > "(ii) the instruction does not provide that payment is to be made at the request of the beneficiary.
>
> "When an instruction is not a payment order because it is issued subject to a condition but the condition is subsequently satisfied and thereafter a bank that has received the instruction executes it, the instruction shall be treated as if it had been unconditional when it was issued.
>
> "(c) 'Originator' means the issuer of the first payment order in a credit transfer.
>
> "(d) 'Beneficiary' means the person designated in the originator's payment order to receive funds as a result of the credit transfer.
>
> "(e) 'Sender' means the person who issues a payment order, including the originator and any sending bank.
>
> "(f) 'Bank' means an entity which, as an ordinary part of its business, engages in executing payment orders. An entity is not to be taken as executing payment orders merely because it transmits them.

"(g) A 'receiving bank' is a bank that receives a payment order.

"(h) 'Intermediary bank' means any receiving bank other than the originator's bank and the beneficiary's bank.

"(i) 'Funds' or 'money' includes credit in an account kept by a bank and includes credit denominated in a monetary unit of account that is established by an intergovernmental institution or by agreement of two or more States, provided that this law shall apply without prejudice to the rules of the intergovernmental institution or the stipulations of the agreement.

"(j) 'Authentication' means a procedure established by agreement to determine whether all or part of a payment order or a revocation of a payment order was issued by the purported sender.

"(k) 'Execution date' means the date when the receiving bank should execute the payment order in accordance with article 10.

"(l) 'Execution' means, with respect to a receiving bank other than the beneficiary's bank, the issue of a payment order intended to carry out the payment order received by the receiving bank.

"(m) 'Payment date' means the date specified in the payment order when the funds are to be placed at the disposal of the beneficiary."

(a) "Credit transfer"

27. A proposal was made to delete the second sentence on the ground that it was unnecessary and presented the danger that a court might interpret the sphere of application of the Model Law as defined in its article 1 in a restrictive manner, for example, by applying the Model Law only to the element of the transfer effected between the sending bank and the receiving bank situated in different States. It was agreed that the Model Law should make it clear that when one segment of the credit transfer was international, the entire credit transfer was subject to the Model Law.

28. The Commission agreed with a proposal to replace the words "series of operations" in the first sentence with the words "series of payment orders". It was suggested that, in addition to contributing to a more precise definition, such a change might meet the concern underlying the proposal to delete the second sentence.

29. Another issue considered by the Commission was whether transfers made for the purpose of reimbursing a receiving bank for executing a payment order should be treated as separate credit transfers. It was noted that the question was of importance for the sphere of application of the Model Law. Were reimbursement transfers not to be considered as separate credit transfers, a credit transfer would be considered international and subject to the Model Law where the originator's bank in State A sends its payment order directly to the beneficiary's bank in State A and reimburses the beneficiary's bank the amount of the payment order by sending a second payment order to its correspondent bank in State B with instructions to credit the beneficiary bank's account at the correspondent bank.

30. According to one view, the definition was satisfactory because it was not desirable for the Model Law to explicitly exclude reimbursement relationships. Some transfer systems operated on the basis of a simultaneous, "the message is the money" approach, involving the simultaneous transmission of a payment order with the transfer of payment, and funds transfer systems currently using non-simultaneous reimbursement might in the future adopt the simultaneous approach. From that standpoint, exclusion of the reimbursement relationship might be seen as impeding the application of the Model Law to transfer systems using the simultaneous approach and thereby hindering rather than fostering high-value, high-volume transactions. The prevailing view, however, was that reimbursement transfers should be regarded as separate credit transfers. Reasons cited for that view were that inclusion of such transfers would give rise to results contrary to the anticipation of a party, in particular the application of the Model Law to an otherwise wholly domestic credit transfer; that it would contradict common usage in banking practice; and that it might cause confusion in the Model Law.

31. In order to implement the decision to treat a reimbursement transfer as a different credit transfer, it was proposed that the second sentence of the definition should be deleted and that the definition in article 2(h) of "intermediary bank" should be modified so as to make it clear that a reimbursing bank is not to be considered an intermediary bank. It was proposed that that should be done by adding the words "that receives and issues payment orders" at the end of article 2(h). It was felt, however, that the second sentence was an important element in the definition of "credit transfer" and should be retained in some form. Suggested modifications included the amendment of the words "intended to carry out" and the addition of language defining reimbursement transfers as different credit transfers. It was suggested that an appropriate modification of the second sentence would obviate the need to modify article 2(h).

32. A proposal was made to refer in the definition to the ending point of a credit transfer. It was suggested that, in order to avoid misunderstanding, it would be more appropriate to include the reference to the ending point of a credit transfer in the present definition rather than, as in the current draft, in the first sentence of article 17(1). The Commission decided to defer its consideration of this proposal until its consideration of article 17.

33. The Commission considered whether to retain the sentence in square brackets at the end of the definition excluding transfers effected through a point-of-sale system. In support of retaining the language, it was stated that such transfers should be excluded because they were debit transfers and therefore outside the purview of the Model Law. Another reason given for exclusion was that such transfers were essentially utilized for consumer purposes, while the Model Law had been prepared with commercial credit transfers in view.

34. The prevailing view, however, was that the sentence should be deleted. In support of that view it was stated that point-of-sale systems could not be generally classified only as debit transfers or only as credit transfers. The classification of a given point-of-sale transfer system depended on its particular characteristics and those that met the criteria for payment orders in the Model Law should not be excluded. It was also felt that a specific

reference to point-of-sale transfers was inappropriate in the absence of a definition in the Model Law of such transfers and in view of the fact that such transfers were still in the process of technological innovation.

35. After deliberation, the Commission decided to retain the first two sentences of the definition of "credit transfer", subject to drafting changes, and to delete the third sentence that had been placed between square brackets.

36. The Commission requested an ad hoc Working Party composed of the representatives of Finland, Mexico and the United Kingdom to prepare a draft text of paragraph 2(a) that would implement the decisions of the Commission. The following text proposed by the Working Party was adopted by the Commission:

> "(a) 'Credit transfer' means a series of payment orders, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of a beneficiary. The term includes any payment order issued by the originator's bank or any intermediary bank intended to implement the originator's payment order. A payment order issued for the purpose of effecting payment for such an implementing order is considered to be included in a separate credit transfer."

(b) "Payment order"

37. Divergent views were expressed as to how the Model Law should deal with conditional payment orders. According to one view, the present definition was unsatisfactory because it required payment orders to be unconditional, thus excluding conditional instructions from coverage by the Model Law. Inclusion of conditional payment orders in the Model Law was said to be desirable because such payments orders were a financial service that banks were increasingly interested in offering to their customers. By excluding that type of transfer, the Model Law might hinder commercial developments and would lead to legal fragmentation since two bodies of law would be needed, one governing non-conditional payment orders and another governing conditional instructions. It was also pointed out that even with inclusion of conditional payment orders banks would remain free to reject them.

38. A number of suggestions were made designed to include conditional payment orders in the Model Law. One suggestion was to remove from the definition the requirement of unconditionality, to address the issue of acceptance or rejection of a conditional payment order and to define the duties of banks with respect to the fulfilment of conditions. A second suggestion was to deal with conditional payment orders as a contractual exception under article 3 to the general principle of unconditionality. A third suggestion was to include a general provision to the effect that the Model Law was applicable to conditional payment orders to the extent that the conditional character so permitted.

39. The view that conditional payment orders should be included in the Model Law did not receive wide support. After deliberation, the Commission endorsed the decision of the Working Group that the Model Law should not govern conditional payment orders and that such payment orders would not be considered "payment orders", except in certain limited circumstances. Furthermore, it was felt that the proposals made to include conditional

payment orders did not address all of the modifications that would be required.

40. At the same time, it was noted that it was neither the intention nor the effect of the Model Law to void or to discourage conditional payment orders. The Commission endorsed the principle contained in the second sentence of the present definition that, under certain circumstances, a payment order that started out as a conditional instruction would be subject to the Model Law. According to that provision, when the condition attached to an instruction was satisfied and thereafter a receiving bank executed the instruction, the payment order was to be treated as if it had been unconditional from the outset, thereby triggering applicability of the Model Law. However, it was generally felt that requiring the fulfilment of the condition for application of the Model Law to conditional instructions ran counter to the principle that the Model Law should deal only with questions related to payment, and should not deal with issues relating to the determination of whether a condition had been fulfilled. The determination of the fulfilment of the condition, as well as the consequences of the execution of a conditional instruction in violation of the condition, were subject to laws outside of the Model Law. Accordingly, the Commission decided to delete the words "but the condition is subsequently satisfied", with the result that a conditional instruction would become subject to the Model Law upon execution by the receiving bank, whether or not the condition had been satisfied. Without such an approach, if the credit transfer was not carried out properly for reasons unconnected with the condition, any rights the customer might have would arise from rules outside of the Model Law.

41. Another concern widely shared in the Commission was that the second sentence, in particular the provision that the conditional payment order was to be treated as if it had been unconditional "when it was issued", might lead to the anomalous result of a retroactive application of the Model Law. It was noted that the words "when it was issued" had been added to ensure that the sender of a conditional instruction would have the same rights as any other originator. Nevertheless, it was felt that, with the present language, a retroactive application could result, leading, for example, to a claim under article 10 that a receiving bank had not executed a payment order within the prescribed time. In order to address that concern, it was proposed that the words "the instruction shall be treated" should be replaced by the words "the instruction shall thereafter be treated".

42. It was noted that, while the Working Group had assumed that the reference to conditional instructions should extend only to those issued by the originator to the originator's bank and not to those sent from one bank to another, the definition did not make that distinction clear. The Commission decided, however, not to limit the provision to conditional instructions issued by the originator since conditional instructions could also be issued to intermediary banks. It recognized, however, the concern that the Model Law should not impose responsibility on banks further down the chain. It was thus agreed that the execution of a conditional instruction must itself be unconditional in order to trigger application of the Model Law. It was proposed that that should be done by adding the word "unconditionally" after the words "a bank that has received the instruction executes it" in the second sentence.

43. The Commission established an ad hoc Working Party composed of the representatives of Finland, Mexico and the United Kingdom and requested it to reformulate subparagraph (b) in the light of the decisions concerning the treatment of conditional payment orders.

44. The ad hoc Working Party implemented the decisions of the Commission by preparing a draft text of a new article 2 bis. On the basis of the draft prepared by the ad hoc Working Party, the Commission adopted the following text of article 2 bis:

> "(1) When an instruction is not a payment order because it is subject to a condition but a bank that has received the instruction executes it by issuing an unconditional payment order, the sender of the instruction thereafter has the same rights and obligations under this law as the sender of a payment order and the beneficiary designated in the instruction shall be treated as the beneficiary under article 2(d).
>
> "(2) This law does not govern the time of execution of a conditional instruction received by a bank, nor does it affect any right or obligation of the sender of a conditional instruction that depends on whether the condition has been satisfied."

45. A suggestion was made that the definition should clarify that a payment order could be transmitted to a receiving bank by any method of communication. Some apprehension was expressed about the suggestion on the ground that it might be seen as obligating banks to accept payment orders transmitted through commercially unacceptable methods of communications. It was pointed out, however, that a bank would remain free to reject a payment order transmitted by a method deemed unacceptable by the bank. It was generally agreed that the definition already implied that various methods of transmission could be used and that the suggestion raised a question of drafting that should be considered by the ad hoc Working Party.

46. A view was expressed that subparagraph (b)(i) was superfluous and did not belong in the definition since it dealt with the legal consequences of the execution of a payment order, a subject dealt with in article 4. In reply, it was pointed out that the subparagraph had been included as necessary to ensure exclusion from the Model Law of debit transfers. It was agreed that the subparagraph should be retained.

47. A concern was expressed that the requirement in subparagraph (b)(ii), which was intended to exclude debit transfers, would have the unintended effect of excluding credit transfers made to a beneficiary who did not have an account at the beneficiary's bank and therefore bearing the instruction that the beneficiary's bank was to "pay on application". In order to address that concern, it was proposed that a provision along the following lines should be added after subparagraph (ii):

> "Subparagraph (ii) shall not prevent an instruction from being a payment order merely because it directs the beneficiary's bank to hold funds for a beneficiary that does not maintain an account with it until the beneficiary requests payment."

48. A question was raised whether the proposed formulation imposed a condition on the payment order. It was stated in reply that the proposed paragraph referred to the mechanism of payment rather than to a condition. The proposal was generally regarded as a helpful clarification that should be incorporated, and it was referred to the ad hoc Working Party.

49. The Commission adopted the following text of paragraph (2)(b) prepared by the ad hoc Working Party:

> "(b) 'Payment order' means an unconditional instruction, in whatever form, by a sender to a receiving bank to place at the disposal of a beneficiary a fixed or determinable amount of money if:
>
> "(i) the receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender, and
>
> "(ii) the instruction does not provide that payment is to be made at the request of the beneficiary."

(c) "Originator"

50. A proposal was made to replace throughout the Model Law the words "issuer" and "to issue" by the words "sender" and "to send". It was stated that in the law of negotiable instruments in many common law countries the terms "issuer" and "to issue" had been given a technical meaning that included an element of mental volition to transfer as well as a physical element of transfer of possession or delivery. The words "to send" or "sender" would raise no risk that the unwanted technical meanings of "to issue" or "issuer" might be applied in the context of the Model Law.

51. It was stated in reply that the words "issuer" and "to issue" had been deliberately chosen by the Working Group and that they should be interpreted in the neutral sense of giving a payment order. Moreover, the suggested terms "sender" and "to send" would be inappropriate in those cases where, for example, the originator gave its payment order over the telephone or handed a written payment order to the receiving bank.

52. The Commission did not accept a more limited proposal which was to replace merely in article 2(c) the word "issuer" by the word "sender". After deliberation, the Commission decided to retain the text of the subparagraph as currently drafted.

(d) "Beneficiary"

53. The Commission adopted the text of the subparagraph as currently drafted.

(e) "Sender"

54. A suggestion was made to replace the words "the person" by the words "a person" in order to reflect the fact that payment orders could be made by various persons. In reply, it was stated that, although various payment orders corresponding to the different phases of the credit transfer might be sent, every particular payment order would be issued by one sender only. The

Commission adopted the text of the subparagraph, subject to review by the Drafting Group, in particular, on that point.

(f) "Bank"

55. A view was expressed that the current definition was too broad in that it included telecommunications carriers, possibly certain securities firms, and other entities that did not maintain the same standard as banks and were not subject to similar regulatory regimes. It was therefore proposed that the current definition should be replaced by the following text, which was said to be based on the text of the 1988 Basle Capital Accord:

> "A bank is defined as an institution that:
>
> "(i) engages in the business of banking;
>
> "(ii) is recognized as a bank by the bank supervisory or monetary authorities of the country of its organization or principal banking operations;
>
> "(iii) receives deposits to a substantial extent in the regular course of business; and
>
> "(iv) has the power to accept demand deposits."

56. The proposal was objected to on the ground that the Model Law should be applicable to all entities that, as an ordinary part of their business, engaged in executing payment orders, even though such entities might not otherwise be considered as "banks" under locally applicable law. It was further stated that the proposed reference to bank supervisory authorities would be inappropriate since it would introduce an element of public law into the Model Law, which was devoted to private law matters, and since it would leave out of the scope of the Model Law such entities as postal services or even central banks, which in many countries executed payment orders as a normal part of their business without being "recognized" or "licensed" by bank supervisory authorities. Yet another objection to the proposal was that the definition of a "bank" under the Model Law should be as broad as possible so that all entities that normally engaged in the execution of payment orders and might be in the situation of competing with each other would be faced with the same rights and obligations under the Model Law. It was also stated that the proposal did not take into account the fact that, in many countries, there existed banks that had no power to accept demand deposits but were merely credit institutions. A concern was expressed that while the Commission had discussed banking procedures with respect to all articles, it had not done so with respect to other entities and that it would therefore be inappropriate to label the Model Law or its articles as applying to "banks". After discussion, the Commission did not adopt the proposal.

57. The Commission endorsed the policy decision made by the Working Group that the Model Law should cover all entities that, although they were not considered to be "banks" under the applicable rules of local law, engaged in executing payment orders as an ordinary part of their business. The Commission was agreed, however, that such a policy decision, currently implemented in the text of the Model Law by means of a broad definition of the

term "bank", should not result in bringing within the scope of the Model Law all institutions that might handle or process payment messages in the course of a credit transfer although they did not actually engage in the execution of payment orders. A widely shared view was that, should such a broad definition of the term "bank" be retained in the final text of the Model Law, it would be desirable to replace the word "bank" by a more appropriate wording, encompassing all entities that functionally executed credit transfers as an ordinary part of their business, and thereby to avoid the potentially misleading connotations that might be carried by the word "bank" under the laws of some countries.

58. The Commission considered how the definition of a "bank" might be drafted so as to implement in a clear manner the above policy decision. It was stated that the second sentence of the subparagraph was intended to make it clear that message carriers and data managers were not covered by the Model Law, but that this sentence did not sufficiently take into consideration the situation of value-added networks, such as CHIPS and CHAPS, that did more than merely "transmit" the message but were none the less intended to be left out of the scope of the Model Law. A proposal was made to add to the current text of the subparagraph the following sentence:

> "An entity that is a payment management system is not to be taken as executing payment orders, including a wire transfer network, automated clearing house or other communications system which transmits payment orders on behalf of its participants".

59. While there was general agreement that message carriers such as the Worldwide Interbank Financial Telecommunication (SWIFT) did not normally engage in executing payment orders and therefore would not be covered by the Model Law, divergent views were expressed as to whether automated clearing houses should be left out of the scope of the Model Law. One view was that automated clearing houses were mere data managers that should not be covered by the Model Law. Another view was that automated clearing houses should be covered since they were, in some countries, registered as banks, operated under the supervision of bank supervision authorities and were obliged to maintain reserves with the central bank. Some netting systems already performed functions similar to those of central banks and, in the future, automated clearing houses might be expected to perform an increasing number of banking activities in relation to the netting of payment orders issued for the execution of financial agreements such as swap agreements involving different currencies or interest rates. After deliberation, the Commission did not adopt the proposal.

60. The question was raised as to whether the Model Law should address the situation of entities which, although they did not engage in executing payment orders as an ordinary part of their business, might occasionally do so. It was considered by the Commission that such an entity should be covered by the Model Law only if the execution of the payment order would be related to the normal course of its business.

61. The Commission considered the possibility of implementing the above-stated policy decision without including a definition of the term "bank" in the Model Law. A proposal was made to delete the subparagraph altogether, thus allowing each country that would adopt the Model Law to give to the word

"bank" its ordinary meaning under the local banking law, and to add in article 1 a new provision on the scope of the Model Law to the effect that the Model Law would apply "to other entities that, as an ordinary part of their business, engage in executing payment orders as it applies to banks". Wide support was expressed in favour of the proposal. It was stated, however, that the wording of the provisions referring to a "sending bank", a "receiving bank" or an "intermediary bank" might have to be reviewed so as to ensure their application to non-bank entities. Moreover, the reference to "other entities" added to article 1 of the Model Law should be drafted in a manner that would avoid the implication that those entities would be submitted to the regulatory rules applicable to banks. After discussion, the Commission adopted the proposal in substance and referred it to an ad hoc Working Party composed of the representatives of Finland, Singapore, the United Kingdom and the United States.

62. The following text was proposed by the ad hoc Working Party and adopted by the Commission as new paragraph (2) of article 1, while current paragraph (2) would be renumbered as paragraph (3):

> "(2) This law applies to other entities that as an ordinary part of their business engage in executing payment orders as it applies to banks."

(g) "Receiving bank"

63. The Commission adopted the text of the subparagraph unchanged.

(h) "Intermediary bank"

64. The Commission adopted the text of the subparagraph unchanged.

(i) "Funds" or "money"

65. The Commission adopted the text of the subparagraph unchanged.

(j) "Authentication"

66. A proposal was made to amend the current definition of "authentication" by deleting the words "all or part of" and by inserting the words "an amendment of a payment order" after the words "payment order", so that the subparagraph would read as follows:

> "'Authentication' means a procedure established by agreement to determine whether a payment order, an amendment of a payment order, or a revocation of a payment order, was issued by the purported sender."

67. In support of the proposal to delete the current reference to a possible authentication of part of a payment order, it was stated that the use of an authentication procedure was always aimed at authenticating the payment order in its entirety, even though the authenticating device might be appended to a specific part of that payment order only. After discussion, the Commission adopted that part of the proposal.

68. In support of the proposed addition of a reference to possible amendments of payment orders, it was stated that, in current banking practice, amendments to payment orders were authenticated in the same way as original payment orders and that that practice should be reflected in the Model Law. In reply, it was stated that the Model Law currently contained no reference to amendments of payment orders. It was recalled that the Working Group had considered a set of draft rules that covered both the revocation and the amendment of payment orders and had noted that the amendment of payment orders might raise additional policy issues to those raised by the revocation of orders. As a result it had been decided by the Working Group to refer only to the revocation of payment orders and no provision had been made for their amendment. After discussion, the Commission did not adopt that part of the proposal. (See paras. 217-221, below, further discussion of amendments to payment orders.)

69. It was suggested that the case where a payment order would be authenticated by a handwritten signature to be compared with a specimen should not be covered by the provisions of article 4, paragraphs (2) to (4), but that the situation should be governed by article 4, paragraph (1) only. It was therefore proposed that the following words should be added to the current definition of authentication: "The term does not include comparison of a signature with a specimen." An alternative proposal was that wording to the same effect should be inserted in article 4, paragraph (2). It was stated in support that the provisions of article 4, paragraphs (2) to (4) put a heavy burden on the purported sender of a payment order subject to authentication. The sender of a payment order authenticated by a handwritten signature would be particularly vulnerable since a signature, once appended to a document, cannot be kept secret and can easily be forged.

70. In reply, it was stated that, although a handwritten signature might not be a commercially reasonable method of authentication for high-value credit transfers, parties should still be free to agree to use it. The Model Law was also intended to regulate other forms of payment orders for which the use of signatures as a method of authentication might be commercially reasonable, particularly in the case of low-value credit transfers. It was also thought that any attempt to define the term "signature" in this context would lead to considerable additional difficulties. After deliberation, the Commission decided not to adopt the proposal, at least for the time being, and to reconsider the matter in connection with its discussion on article 4.

71. A proposal was made to enlarge the definition of "authentication" by re-expressing the existing requirement so that the procedure was able to confirm the identity of the sender, and by adding words to extend the meaning of the term to include procedures to detect error, omission or alteration in the text of the payment order, and erroneous duplication of a payment order, now addressed separately in paragraph (5) of article 4. No support was expressed for the proposal.

(k) "Execution date"

72. It was proposed that the reference to article 10 should be deleted on the ground that the inclusion in definitions of references to substantive provisions dealing with the term being defined was a practice to be avoided. It was also pointed out that the present definition was the only one to

include such a reference. A differing view was that such references were acceptable as long as the article being referred to in the definition did not itself contain a reference back to the definition. The Commission decided to delete the reference and noted that, as a consequence of the deletion, the words "should execute" needed to be replaced by the words "is required to execute".

73. The view was expressed that the provisions of the Model Law relating to payment, execution and acceptance were circular in that under article 4(6) a sender was not obligated to pay for a payment order until the execution date, but it was implicit in article 10 that a payment order did not have to be executed until it had been accepted and under articles 6(2)(a) and 8(1)(a) acceptance did not take place (assuming no other action on the part of the receiving bank) until payment was received. It was said that the problem was also relevant to the present definition. The Commission noted that amendments were to be proposed to articles 4(6) and 10 that were intended to overcome the problem.

74. The Commission adopted subparagraph (k) subject to the deletion of the reference to article 10 and the consequential change in wording. The Drafting Group subsequently substituted a definition of "execution period" in place of "execution date" to take account of the decisions taken in regard to article 10(1) permitting a receiving bank to execute a payment order on the day following the day of receipt (see paras. 198-204, below).

(l) "Execution"

75. The Commission considered whether to expand the definition to include the notion that a payment order could be "executed" by the beneficiary's bank. It was noted that the Working Group had not provided for execution of a payment order by the beneficiary's bank since, from the viewpoint of the Model Law, the credit transfer was completed when the beneficiary's bank accepted the payment order. The Working Group had not had time, however, to review the entire text to see whether all references to "execution" were compatible with that approach and decided to bring the potentially inconsistent uses of that term to the attention of the Commission by placing them in square brackets.

76. The principal reason cited in favour of not expanding the definition was that the actions of the beneficiary's bank that might be referred to as execution of a payment order were beyond the ambit of the Model Law. According to that view, credit transfers were, pursuant to article 17(1), considered completed upon acceptance of a payment order by the beneficiary's bank. Any actions to be taken by the beneficiary's bank subsequent to acceptance were, as provided in article 9(1), a matter of the relationship between the beneficiary's bank and the beneficiary and subject to rules of law outside of the Model Law. In response, it was pointed out that the Model Law did contain provisions governing that relationship, in particular the obligation placed on the beneficiary's bank to place the funds at the disposal of the beneficiary upon acceptance of a payment order. Another consideration advanced in support of expanding the definition was the need to be able to speak in terms of execution of payment orders by the beneficiary's bank in view of the definition in article 2(f) of a bank as an entity that engages in executing payment orders. It was also suggested that providing for execution of payment orders by the beneficiary's bank would have the practical advantage

of permitting the retention of the use of the term "execution" at various points in the text where it had been placed in square brackets.

77. The Commission requested an ad hoc Working Party composed of the representatives of Finland, Japan and the United Kingdom to attempt to revise the definition so as to encompass execution of payment orders by the beneficiary's bank. The ad hoc Working Party proposed that execution of payment orders by the beneficiary's bank should be defined in terms of the following actions of the beneficiary's bank listed in article 8(d), (e), (f) and (g): crediting the beneficiary's account or otherwise placing the funds at the disposal of the beneficiary; giving the beneficiary notice that it had the right to withdraw the funds or use the credit; otherwise applying the credit as instructed in the payment order; applying the credit to a debt of the beneficiary owed to the beneficiary's bank or applying it in conformity with an order of a court. A suggestion was made that it was necessary to add to the proposal the stipulation that execution would take place upon the earliest of those actions.

78. It was widely felt that the approach proposed by the ad hoc Working Party was problematic in that it defined "execution" of a payment order by the beneficiary's bank by reference to actions that, under article 8, constituted methods of acceptance of a payment order. Such an approach could lead to a confusion in the Model Law of the notion of acceptance of a payment order by the beneficiary's bank, which was within the ambit of the Model Law, and the notion of execution of the payment order, which was, pursuant to articles 9(1) and 17(1), outside of the Model Law. Another concern was that the proposal would complicate the Model Law and make it difficult to understand.

79. Similar concerns were expressed about a second proposal, according to which a beneficiary's bank would be considered to execute a payment order by accepting it. That proposal differed from the proposal of the ad hoc Working Party in that it defined execution of payment orders by the beneficiary's bank not only in terms of article 8(d), (e), (f) and (g), but also in terms of paragraphs (a), (b) and (c) of article 8. It was suggested that the inclusion in a definition of "execution" of substantive elements of article 8(a), (b) and (c) was inappropriate because those provisions referred to events that constituted acceptance by the beneficiary's bank of a payment order without the taking of any action to place funds at the disposal of the beneficiary.

80. The attempt to formulate a definition of execution by the beneficiary's bank revealed difficulties in separating in such a definition elements of the acceptance of a payment order by the beneficiary's bank from elements of the execution of a payment order by the beneficiary's bank. Those difficulties arose because under the Model Law certain factual events constituted both acceptance and execution. The Commission therefore decided that it would not be possible to expand the definition. It was agreed, however, that the definition should not imply that execution of payment orders was confined solely to receiving banks other than the beneficiary's bank. With such an approach, the word "execution" could be used in the Model Law in its ordinary sense with respect to actions of the beneficiary's bank, and in terms of the meaning set forth in the definition in relation to receiving banks other than the beneficiary's bank. In order to implement that approach, it was suggested that the words "with respect to a receiving bank other than the beneficiary's bank" should be moved to the beginning of the definition. A further

suggestion was that the need for the definition as a whole should be re-evaluated in conjunction with the review of article 6(2)(d).

81. The Commission adopted the definition, subject to the decision that the definition, in defining "execution" by receiving banks other than the beneficiary's bank, should not exclude the use of the term in its ordinary sense with respect to actions by the beneficiary's bank. The Drafting Group subsequently placed the definition in square brackets.

(m) "Payment date"

82. A proposal was made to delete the definition. In support of that proposal it was pointed out that the term was used in articles 10(1), 10(3), 11(2) and 16(5) and that, with the exception of article 10(1), it would be more appropriate to refer to the "execution date". It was further suggested that there would be little point in keeping the defined term for use only in article 10(1). It would be sufficient there to refer to "a date when the funds are to be placed at the disposal of the beneficiary". Such a complete avoidance of the use of the term "payment date" was also desirable in view of the fact that SWIFT payment messages did not contain a field for a payment date and since the term as presently defined was inconsistent with the International Organization for Standardization (ISO) standard, which used the same term to refer to what was referred to in the Model Law as the "execution date". In view of the foregoing, the Commission decided to delete the definition.

Additional definitions

"Purported sender"

83. A proposal was made to define the term "purported sender" with a view to achieving clarity, particularly in the application of article 4. It was agreed to consider the proposal if, during the later discussion of article 4, a need for such a definition became evident.

"Beneficiary's bank"

84. It was noted that the Secretariat in the comments on the draft Model Law had described certain problems that might make it advisable to define the term "beneficiary's bank" (A/CN.9/346, comment 49 to article 2). It was agreed that the need for such a definition should be considered after the discussion of the substantive articles of the Model Law.

"Interest"

85. The Commission considered whether it would be appropriate to include in the Model Law a provision defining the term "interest" and to establish a method for calculating the amount of interest due under article 16 and possibly other provisions of the Model Law. It was generally agreed that a provision of that type was desirable because it would increase predictability as to the rights and obligations of the parties under the Model Law, thereby limiting disputes.

86. The Commission initially considered two proposals for a provision on interest, both of which were based to a varying extent on the Guidelines on International Interbank Funds Transfer and Compensation of the International Chamber of Commerce ("ICC Guidelines"; ICC Publication No. 457). The first proposal was to include in article 2 a definition of "interest" consisting of a formula for calculating interest, namely, the interbank rate in the currency of the State in which the receiving bank was located. That proposal expressly referred to the right of the parties to vary the provision by agreement. The second proposal, which was more closely patterned on the ICC Guidelines, was to add a separate article on interest. The proposed article defined interest as the time value of the transaction amount in the country of the currency involved and provided for that calculation at the rate customarily accepted by the local banking community of that country. It also contained provisions identifying the account to be credited and defining the period of time for which interest was payable.

87. In the consideration of those proposals a number of questions emerged. One question was whether the Model Law should attempt to define "interest". A view was expressed that the term could not be defined by a simple reference to "time value", as in the second proposal, since interest was also calculated on the basis of other factors such as risk and inflation. The prevailing view, however, was that inclusion of a definition was desirable. It was further felt that the reference to "time value" was an appropriate definition because the relatively short periods for which interest was typically paid in credit transfers reduced the importance of other factors such as inflation.

88. Another question concerned the manner in which the amount of interest was to be calculated, a question in respect of which the two proposals differed. The first proposal referred to the interbank rate of the currency of the State in which the receiving bank was located, while the second proposal referred to the currency of the transfer and the rate customarily accepted by the local banking community of the country of that currency. It was noted that the two proposals would lead to different results when the currency of the credit transfer was different from the currency of the country where the receiving bank was located. It was stated in support of the first proposal that it would provide greater predictability and certainty, while the second proposal was supported on the ground that it was more flexible, that interest was generally linked to a currency and not to the place where a person receiving the funds was located, and that the interbank rate was not necessarily appropriate as a general rule because originators and beneficiaries in credit transfers covered by the Model Law were often not banks and their needs could not so easily be accommodated through a uniform rate designed for interbank transfers. A concern raised with regard to both proposals was that the use of the term "currency", and in particular the reference to the currency of the country in which the receiving bank was located, presented a difficulty for credit transfers denominated in units of account.

89. The Commission requested an ad hoc Working Party composed of the representatives of Mexico and the United States of America to formulate a further proposal in the light of the proposals and the views put forth thus far. The ad hoc Working Party proposed treating the question of interest in a separate provision, article 16 bis, with the following content:

> "Unless otherwise agreed, 'interest' means the time value of the transaction amount in the funds or money involved. Interest shall be calculated at the rate and on the basis customarily accepted by the local banking community for the funds or money involved."

90. The Commission noted that the use of the words "funds or money", instead of the word "currency", covered units of account in accordance with article 2(i). Coverage of units of account was also accommodated by the fact that the provision calculated interest on the basis of the funds or money involved, rather than on the basis of the currency of the country where the receiving bank was located.

91. While the text proposed by the ad hoc Working Party received wide support, a number of concerns were expressed, with particular regard to the use of the term "transaction amount", which was not defined in the Model Law, and the reference to "local banking community". Use of the latter term was questioned both on the ground that the reference should more properly be to the international banking community and on the ground that it was not clear as to the place being referred to. It was also stated that, because there were a variety of possible interest rates, including commercial bank, savings bank and interbank rates, the definition of interest needed to be more precise. In an attempt to meet some of those concerns, it was proposed that the words "time value of the transaction amount" should be replaced by the words "time value of the amount of the payment order". That proposal was accepted, subject to deletion of the reference to the payment order in view of the cases envisaged in articles 13 and 16(3) in which interest was due only on the amount actually transferred and not on the amount on the face of the payment order. It was also agreed that the word "local" preceding the words "banking community" should be deleted. A concern was expressed that the reference to the parties' right to vary the provision by agreement could lead to instances in which, in the name of varying interest provisions, a bank would reduce its liability to a non-bank originator or beneficiary in violation of article 16(7). The Commission decided to retain the reference to contractual freedom and to take up this concern when considering article 16(7).

92. The Commission decided to further modify the proposal of the ad hoc Working Party so as to permit inclusion of the provision on interest as a definition in article 2. The text adopted by the Commission read as follows:

> "Unless otherwise agreed, 'interest' means the time value of the amount in the funds or money involved, which is calculated at the rate and on the basis customarily accepted by the banking community for the funds or money involved."

Article 3

93. The text of draft article 3 as considered by the Commission was as follows:

> "Article 3. Variation by agreement
>
> "Except as otherwise provided in this law, the rights and obligations of a party to a credit transfer may be varied by agreement of the affected party."

94. Divergent views were expressed as to the appropriateness of the approach taken to the principle of freedom of contract in article 3, which provided that the parties may vary their rights and obligations under the Model Law subject to the exceptions set forth in individual provisions of the Model Law. According to one view, it was necessary to accord the parties the maximum possible degree of freedom of contract and the approach in article 3 did not go far enough in that direction. Restricting contractual freedom was said to limit competition by depriving banks of the opportunity to develop different offers for payments, and to have the potential for deterring the use of credit transfers. It was also suggested that restrictions on contractual freedom would limit the adaptability of the Model Law to future technical developments in international payments. It was suggested that all mandatory provisions in the Model Law could be deleted because the focus of the Model Law was to establish rules of a private law character for commercial parties who were in a position to protect their interests in negotiating the contractual terms of their credit transfer relationships. Provisions of the Model Law would serve as a measure of the reasonableness of contractual arrangements without having to be made mandatory.

95. At the other end of the spectrum was the view that the freedom of contract as accorded to the parties in the current draft had to be restricted to a significant degree because a large portion of the provisions were either not logically capable of being varied or were an essential part of the structure of the Model Law. It was suggested that the approach in article 3 should be reversed, so that the parties would be free to vary their rights and obligations only where individual provisions of the Model Law permitted them to do so. According to that view, such a restraint of freedom of contract was needed because the credit transfer mechanism in the Model Law would function properly only if all the parties implemented their responsibilities as set forth in the Model Law. Another element that figured prominently in that view was the concern that broad freedom of contract with regard to credit transfers could be injurious to third parties.

96. The prevailing view in the Commission was that the approach developed by the Working Group should be retained because it struck a reasonable balance between the need, on the one hand, to recognize freedom of contract, and, on the other hand, to make some provisions of the Model Law mandatory. Nevertheless, the Commission recognized the need to examine each article in order to assess whether any additional limits on freedom of contract were needed, or whether any existing limits should be lifted.

97. The Commission's deliberations revealed a degree of uncertainty as to whether the words "by agreement of the affected party" constituted a statement that a variation by agreement of parties pursuant to article 3 required the agreement of third parties affected by the variation. A view was expressed that article 3 should reiterate the principle of general contract law that two parties cannot by their own contract alter the rights and obligations of a third party. Such a provision would ensure that enactment of the Model Law would not compromise that principle. It was agreed that, if it was the intention of article 3 to make such a statement, the present wording was not sufficiently clear. Wording along the following lines was proposed for encompassing the notion of agreement by affected third parties: "... by agreement, with the consent of the affected party."

98. The prevailing view was that article 3 should not refer to the need for agreement of third parties affected by a variation agreed upon by the parties to the credit transfer. It was felt that the question should be left to general contract law, in which it was widely recognized that alteration of the rights and obligations of third parties required the agreement of those third parties. The Commission having decided to limit the application of the article to the parties to the credit transfer and to exclude references to third parties, it remained to find a formulation reflecting that decision. It was generally agreed that use of the word "affected" was unsatisfactory because it was not clear whether that word referred to a particular type of legal, economic or other adverse effect on a party and because it could be interpreted as including persons, other than the parties to the credit transfer, that were indirectly affected. Accordingly, it was agreed that the words "by agreement of the affected party" should be replaced by the words "by agreement of the parties concerned."

99. After deliberation, the Commission adopted the text of article 3, subject to replacing the words "of the affected party" by the words "of the parties concerned."

Proposal for an additional article on interpretation

100. It was proposed that an additional article along the following lines on uniform interpretation should be included in the Model Law:

"Article X. Interpretation

> "In the interpretation of this law, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith."

101. In support of the proposal it was said that such a provision, which was found in conventions formulated by UNCITRAL, should also be included in a model law. The proposal was intended to diminish the degree to which inconsistent national interpretations of the Model Law would restrain harmonization of international trade law. Such a provision would do so by serving as a useful reminder of the international ambit of the relationships regulated by the Model Law, and thereby foster uniform interpretation. It was stated that the inclusion of a provision on uniform interpretation would be in line with the interest expressed by the Commission in the uniform interpretation and application of legal texts prepared by UNCITRAL, as evidenced by its decision to collect and disseminate information on decisions interpreting such texts, including Model Laws.

102. Reservations were expressed as to the advisability of including the proposed provision. In particular, it was stated that such a provision, while appropriate in a convention, could not properly be included in the Model Law, which was destined to be adopted as a piece of national legislation. In a number of countries enactment into national legislation of a provision of this type on interpretation would not be possible, unless the legislation implemented a convention. It was also suggested that inclusion of a provision of this type in the Model Law would complicate the application of the Model Law to domestic transfers where an enacting State wished to do so.

103. As a refinement to the proposal, it was suggested that the provision should refer to the "international character of the relationships regulated by this Law" in place of referring to the "international character" of the Model Law. Another suggestion was that the substance of the proposed provision should be included in a preamble. However, those suggestions did not generate wide support, and the Commission, in view of the reservations that had been voiced, decided against inclusion of the proposed article. (The Commission briefly returned to the issue in the context of article 11. See paras. 220 and 222, below.)

Article 4

104. The text of draft article 4 as considered by the Commission was as follows:

> "Article 4. Obligations of sender
>
> "(1) A purported sender is bound by a payment order or a revocation of a payment order if it was issued by him or by another person who had the authority to bind the purported sender.
>
> "(2) When a payment order is subject to authentication, a purported sender who is not bound under paragraph (1) is nevertheless bound if:
>
> > "(a) the authentication provided is a commercially reasonable method of security against unauthorized payment orders, and
> >
> > "(b) the receiving bank complied with the authentication.
>
> "(3) The parties are not permitted to agree that paragraph (2) shall apply if the authentication is not commercially reasonable.
>
> "(4) A purported sender is, however, not bound under paragraph (2) if it proves that the payment order as received by the receiving bank resulted from the actions of a person other than a present or former employee of the purported sender, unless the receiving bank is able to prove that the payment order resulted from the actions of a person who had gained access to the authentication procedure through the fault of the purported sender.
>
> "(5) A sender who is bound by a payment order is bound by the terms of the order as received by the receiving bank. However, if the sender and the receiving bank have agreed upon a procedure for detecting erroneous duplicates or errors in a payment order, the sender is not bound by the payment order if use of the procedure by the receiving bank revealed or would have revealed the erroneous duplicate or the error. If the error that the bank would have detected was that the sender instructed payment of an amount greater than the amount intended by the sender, the sender shall be bound only to the extent of the amount that was intended.
>
> "(6) A sender becomes obligated to pay the receiving bank for the payment order when the receiving bank accepts it, but payment is not due until the [execution date], unless otherwise agreed."

Paragraph (1)

105. A view was expressed that it was not clear whether article 4 applied to a case where the terms of an authorized payment order were altered by an unauthorized person. It was proposed that the issue could be clarified by deleting the first sentence of paragraph (5) and by replacing in paragraph (1) the words "bound by a payment order" by the words "bound by the term of a payment order". That proposal did not gain support because it was viewed as intermingling the notion of authentication of source with the notion of error.

Paragraph (2)

106. A view was expressed that the term "commercially reasonable" in subparagraph (a) was too vague a standard for measuring the adequacy of authentication methods. It was stated that additional precision would be obtained by adding the words "safe and" before the words "commercially reasonable". Use of that formulation was questioned on the ground that it might suggest that there existed flawless authentication methods. A similar proposal was to insert the word "reliable" before the words "commercially reasonable". The Commission concluded that those types of qualifying words were not appropriate since the concepts of safety and reliability were themselves an integral part of the notion of commercial reasonableness. A view was expressed that, under some circumstances, parties might reasonably agree to have no security because of commercial considerations. Another proposal was to include in the provision factors to be taken into account in assessing whether an authentication procedure met the standard. There was general agreement with the basic thrust of the proposal; yet, as the proposed factors related to the circumstances surrounding a credit transfer, the Commission decided that it would suffice to add the words "under the circumstances" after the words "the authentication method provided is".

107. The Commission resumed its discussion of the status under the Model Law of authentication by comparison of a handwritten signature with a specimen. It noted that it had begun the discussion in connection with the definition of "authentication" in article 2(j) (see paras. 69 and 70, above). It was generally felt that the Model Law should not exclude such a method from the coverage of the Model Law or pass judgment on its commercial reasonableness; as had been pointed out in the earlier discussion, the commercial reasonableness of such a method of authentication depended on the circumstances of each case. Rather, the issue to be decided in the context of article 4 was the extent to which the provisions on allocation of risk contained, in particular, in paragraphs (2) to (4) should cover the case of a forged signature.

108. The view was expressed that article 4 should apply in its entirety to authentication by comparison of signatures, in particular because new electronic methods of comparison of handwritten signatures promised to make such authentication increasingly reliable. For reasons that had been stated in the earlier discussion, however (see para. 69, above), the prevailing view was that the Model Law should follow the traditional rule that a sender did not bear the risk of a forgery. Accordingly, the Commission decided to add a provision expressly excluding the application of paragraphs (2) to (4) to authentication by comparison of signatures. As a result of that decision,

only paragraph (1) remained governing authentication by comparison of signatures. At the same time, it was recognized that the parties could vary the exclusion of paragraphs (2) to (4) by agreement pursuant to article 3.

109. As regards subparagraph (b), it was proposed that the words "complied with" should be replaced by the words "performed properly". That modification was intended to address a concern that the provision did not provide a clear answer to the allocation of risk in cases where the authentication result was incorrect due to a technical malfunction at the receiving bank. However, the existing text was not modified because it was generally felt that the reference to compliance with an authentication method covered the problem of technical malfunctions and that the proposed language would not result in additional clarity.

Paragraph (3)

110. A proposal was made to delete the paragraph. It was stated in support that the Model Law should not set a binding standard as to what would constitute a commercially reasonable authentication procedure. In practice, the commercial reasonableness of an authentication procedure depended on factors related to the individual payment order, such as whether the payment order was paper-based, oral, telex or data transfer, the amount of the payment order and the identity of the purported sender, and any statement of the parties in their agreement that they chose to use a procedure that was less protective than others available, especially if they explained the reasons why they had made that decision. The Model Law should not discourage the use of a given method of authentication for the sole reason that it would be less secure than other methods available, particularly if the receiving bank offered the sender at a reasonable price another authentication procedure that clearly was commercially reasonable, but the sender chose to use the less secure procedure for reasons of its own. Another reason given for the deletion of the paragraph was that, because paragraph (2) dealt only with payment orders subject to authentication, the current text would readily make it possible for the parties to vary the terms of the Model Law as they related to an unauthenticated payment order. It was also stated that, as long as there would be no case law to determine the content of a commercially reasonable method of authentication, parties could have no certainty as to the legal validity of the agreements they might enter into regarding methods of authentication.

111. The proposal was objected to on the grounds that the current text of the paragraph established a minimum standard and that, should it be deleted, the entities that engaged in the execution of payment orders would be allowed to impose on their customers standard terms providing that senders of payment orders would be bound by the contents of payment orders that were not authenticated by the use of a reasonable authentication procedure, even if those payment orders had been issued by unauthorized persons. It was stated that such a result would contradict a general rule that existed in many legal systems.

112. The Commission then considered an intermediate proposal, which was to add appropriate wording to the current text of the paragraph to the effect that parties would be free to derogate from paragraph (2) by a specific individually negotiated agreement but not by means of standard forms of

contract. Although some support was expressed for the proposal, it was widely felt that the definition of a specific agreement as opposed to standard forms or general conditions would be difficult to formulate with precision and that the proposed distinction might cause problems in those jurisdictions where the use of standard forms was not fully developed.

113. The Commission was agreed that the minimum standard currently contained in the paragraph should be maintained but that it should be made sufficiently flexible to allow parties to agree on the use of a lower standard if such an agreement was justified by the circumstances. The Commission accepted a proposal to add at the end of paragraph (3) the words "under the circumstances", so that paragraph (3) as adopted by the Commission read as follows:

> "(3) The parties are not permitted to agree that paragraph (2) shall apply if the authentication is not commercially reasonable under the circumstances."

Paragraph (4)

114. It was suggested that the reference to "a present or former employee of the purported sender" was undesirably narrow since it might exclude a person that, in some legal systems, might not be regarded as an employee, e.g., a director, an officer or another person whose relations with the purported sender might have enabled him or her to obtain improper access to the authentication or other operations of the purported sender.

115. Another view was that the reference to "a present or former employee of the purported sender" was undesirably wide as it covered any employee regardless of his or her position in the company. However, it was widely felt that all employees should be covered since all of them might have had access to the authentication procedure. Yet another view was that the reference should be expanded so as to cover all agents of the purported sender, including independent agents such as sending facilitators. It was stated, in reply, that the term "agent" was imprecise due to the varying interpretations of the term in different jurisdictions. Moreover, those agents that belonged to the inside circle to be covered by the reference would be included if the above suggestion (see para. 114, above) was accepted.

116. After deliberation, the Commission adopted the above suggestion in substance and agreed that it should not be limited to situations of "improper" access. Accordingly, it decided to add to the reference to "a present or former employee of the purported sender" wording along the following lines "or other person whose relations with the purported sender enabled it to obtain access to the authentication procedure".

Paragraph (5)

117. It was proposed that the scope of the paragraph should be expanded so as to include a revocation of a payment order. The Commission adopted the substance of the proposal and referred it to the Drafting Group.

118. It was observed that paragraph (5) covered errors in transmission of a payment order, and did not cover, as did paragraphs (1) to (4), fraudulent

alterations of a payment order by a third person. It was suggested that that interpretation of the text should be expressed by adding at the beginning of paragraph (5) wording such as "Subject to paragraphs (1) to (4)". While the Commission agreed with the observation, it did not consider it necessary to express that interpretation of the text by adding words to paragraph (5).

Paragraph (6)

119. A view was expressed that paragraph (6) should not specify the date when the sender's obligation to pay the receiving bank became due, because contractual arrangements governing the relationship between senders and receiving banks often stipulated that date. Moreover, a rule on the date on which the sender's obligation to pay the receiving bank became due was meaningless in the situation where the receiving bank was deemed to have accepted a payment order on the day the bank received payment for that payment order. The opposing view was that settling the due date in the Model Law was necessary for cases where the date was not determined by a contractual arrangement between the sender and the receiving bank. It was not prudent to leave the determination of that date to rules outside the Model Law since those rules might contain provisions that were inappropriate for international credit transfers.

120. The Commission adopted the latter view and consequently retained the text as prepared by the Working Group. The Commission decided to remove the square brackets and to retain the words "execution date".

Article 5

121. The text of draft article 5 as considered by the Commission was as follows:

"Article 5. Payment to receiving bank

"Payment of the sender's obligation under article 4(6) to pay the receiving bank occurs:

"(a) if the receiving bank debits an account of the sender with the receiving bank, when the debit is made; or

"(b) if the sender is a bank and subparagraph (a) does not apply,

"(i) when a credit that the sender causes to be entered to an account of the receiving bank with the sender is used or, if not used, on the business day following the day on which the credit is available for use and the receiving bank learns of that fact, or

"(ii) when a credit that the sender causes to be entered to an account of the receiving bank in another bank is used or, if not used, on the business day following the day on which the credit is available for use and the receiving bank learns of that fact, or "(iii) when final settlement is made in favour of the receiving bank at the central bank of the State where the receiving bank is located, or

"(iv) when final settlement is made in favour of the receiving bank

"a. through a funds transfer system that provides for the settlement of obligations among participants either bilaterally or multilaterally and the settlement is made in accordance with applicable law and the rules of the system, or

"b. in accordance with a bilateral netting agreement with the sender; or

"(c) if neither subparagraph (a) nor (b) applies, as otherwise provided by law."

Opening words

122. It was proposed that the opening words of the article should indicate that its provisions would apply only in the context of articles 6(2)(a) and 8(1)(a) or, alternatively, that the article should be deleted and its current provisions embodied in the text of articles 6(2)(a) and 8(1)(a). In support of the proposal, it was stated that, in the Model Law, the time of payment was of direct relevance only in the context of deemed acceptance. It was also stated that the current wording did not indicate that the function of the article was limited to such a narrow purpose but suggested that the article was intended to determine the time of payment for a more general purpose. In particular, it could be construed that article 5 was intended to affect the application of insolvency law to a sender or receiving bank that had become insolvent, a result that was said to be inappropriate. It was stated that in contexts outside articles 6(2) and 8(1) it might cause problems to state as a general rule that, where the sender credited an account of the receiving bank with the sender, "payment" by the sender to the receiving bank "occurred" on the day following the day on which the credit became available. That rule would be inappropriate, for example, in the context of article 17. Moreover, the current draft of subparagraphs (b)(i) and (b)(ii) of article 5 seemed to confuse the question of when payment occurred with the question of when the receiving bank was in a position to determine whether the credit provided constituted acceptable cover.

123. The proposal was objected to on the grounds that the Model Law should indicate the time of payment not only in the case when acceptance resulted from the failure of the receiving bank to act upon receipt of a payment order but also in the situations where acceptance resulted from a positive act by the receiving bank. It was stated that in all cases it would be useful for the sender to know when payment occurred because the time of payment would be the time when the sender fulfilled its obligation to pay the receiving bank.

124. Another proposal was to state in the opening words that the article would only be applicable "for the purposes of this law" and thus not have any

bearing on issues outside the scope of the Model Law (e.g. insolvency). After discussion, the Commission adopted the proposal.

Subparagraphs (a) to (b)(ii)

125. A view was expressed that the provisions of article 5 might be inconsistent with the principles contained in article 17. For example, where the sender paid the receiving bank through a third bank, there might be an inconsistency between the time when payment was made to the receiving bank under article 5(b)(ii) and the time when the obligation was discharged under article 17(2).

126. In reply, it was stated that the conflict between the provisions of articles 5(b)(ii) and 17(2) might be solved if the reference to "another bank" in article 5(b)(ii) were to be interpreted as indicating a bank with which the beneficiary did not have a banking relationship, while the "beneficiary's bank" mentioned in article 17(2) would be considered as a bank with which the beneficiary normally held an account relationship. It was suggested that such interpretation might be easier if the words "another bank" were replaced by the words "another bank with which there is no account relationship". A different view was that no conflict existed between those two provisions since they dealt with different issues: article 5(b)(ii) dealt with the time when the sender paid the receiving bank while article 17(2) dealt with the time when the originator discharged its obligation to the beneficiary. The Commission decided to postpone its discussion until it had considered article 17(2).

Subparagraph (b)(iii)

127. A proposal was made to amend the paragraph as follows:

> "when final settlement is made in favour of the receiving bank at a central bank at which the receiving bank maintains an account, or".

128. In support of the proposal, it was stated that, in many instances, a receiving bank could obtain "central bank settlement" at the central bank of countries other than the country in which the receiving bank was located. If the basis of the rule laid down in the subparagraph was that a settlement through an account at a central bank was equivalent to a settlement in cash, all cash settlements at central banks should be treated in the same way, irrespective of whether the central bank involved was that of the country in which the receiving bank was located. After discussion, the Commission adopted the proposal.

129. Another proposal was that the subparagraph should be amended to limit the effect of central bank settlement to the situation where the account of the receiving bank credited at a central bank was freely available for use and not, for example, subject to any foreign exchange prohibition. It was stated in reply that the Model Law should not deal with possible exchange regulations or banking regulations and that the proposed amendment would create more problems than it would solve. After discussion, the Commission decided not to adopt the proposal.

Subparagraph (b)(iv)

130. A proposal was made to delete the reference to "applicable law". It was recalled that netting schemes were instituted only by contractual agreement between all the parties concerned. While those agreements would have to be in conformity with the law to be enforceable, it was noted that they did not necessarily have to receive approval of the banking authorities. It was also recalled that the Report of the Group of Experts on Payments Schemes of the Central Banks of the Group of Ten Countries, which met under the auspices of the Bank for International Settlements (BIS), stated that the internal rules creating the netting schemes should be in conformity with the laws of all of the States from which there were parties to the agreement. The monetary settlement that took place between a sending bank and a receiving bank linked by a netting scheme could be in accordance only with the internal rules of the netting scheme. After discussion, the Commission decided to delete the reference to applicable law.

131. A concern was expressed that unqualified reference to netting schemes should not result in validating a netting scheme that would conform neither with national laws nor with generally accepted rules, such as the ones set out in the report of the Group of Experts. The prevailing view, however, was that the validity of bilateral or multilateral netting schemes could safely be left to be determined by whatever rules would be applicable in the different countries concerned.

132. The Commission took note of the recommendation by the Working Group (see A/CN.9/344, para. 61) to national legislators that domestic laws, especially laws dealing with bankruptcy and insolvency, should be reviewed with the objective of supporting interbank netting of payment obligations.

Subparagraph (c)

133. The Commission adopted the text of the subparagraph unchanged.

Article 6

134. The text of draft article 6 as considered by the Commission was as follows:

"Article 6. Acceptance or rejection of a payment order by receiving bank that is not the beneficiary's bank

"(1) The provisions of this article apply to a receiving bank that is not the beneficiary's bank.

"(2) A receiving bank accepts the sender's payment order at the earliest of the following times:

"(a) when the time for execution under article 10 has elapsed without notice of rejection having been given, provided that:
(i) where payment is to be made by debiting an account of the sender with the receiving bank, acceptance shall not occur until there are funds available in the account to be debited sufficient to cover the

> amount of the payment order; or (ii) where payment is to be made by other means, acceptance shall not occur until the receiving bank has received payment from the sender in accordance with article 5(b) or (c),
>
> "(b) when the bank receives the payment order, provided that the sender and the bank have agreed that the bank will execute payment orders from the sender upon receipt,
>
> "(c) when it gives notice to the sender of acceptance, or
>
> "(d) when it issues a payment order intended to carry out the payment order received.
>
> "(3) A receiving bank that does not accept a sender's payment order, otherwise than by virtue of subparagraph (2)(a), is required to give notice to that sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than on the execution date."

Paragraph (1)

135. The Commission adopted the paragraph unchanged.

Paragraph (2)

136. A proposal was made to delete subparagraph (2)(a), which contained the rule often referred to as "deemed acceptance rule". It was stated in support that a sender was expected to know whether it had made adequate provision for paying the receiving bank. Moreover, although the concept of deemed acceptance was intended to favour the sender, it might also adversely affect the sender's situation by creating a link between the sender and a receiving bank that acted in a dilatory manner upon receipt of a payment order. It was also stated that, since deemed acceptance would establish a binding link between a sender and a receiving bank that might be unsuitable to the sender, it would seem more appropriate to rely on the concept of deemed rejection. The proper way of addressing the issue of inactivity by a receiving bank was not to deem the payment order to be accepted but to state the conditions under which the inactive receiving bank might be held liable to the sender under article 16 of the Model Law. A further problem with deemed acceptance was that even when the payment order was received before the bank's cut-off time, the bank might be unable to execute it on the same day if "deemed acceptance" under paragraph (2)(a) occurred too late in the day. (In this connection, see the decision to add an extra day within article 10(1), as reported in paras. 198-204, below).

137. In opposition to the deletion of the deemed acceptance rule, it was recalled that the mechanism of deemed acceptance was intended to discourage receiving banks from remaining inactive upon receipt of payment orders, and thus to contribute to the elimination of uncertainties and delays that might affect the credit transfer process. The deemed acceptance rule was in the interest of the sender since it gave him a claim for consequential damages in the case where the receiving bank had failed to notify rejection of a payment order. It was stated that a notice of rejection was needed to inform a good

faith sender that there was a problem that needed to be rectified and that otherwise might have remained unknown. After discussion, the Commission decided to retain the concept of deemed acceptance.

138. As regards subparagraphs (2)(a) to (d), a proposal was made to modify the order of the subparagraphs. Since current subparagraphs (b) to (d) dealt with situations in which acceptance resulted from a positive action of the receiving bank, they should be placed before current subparagraph (a), which dealt with the case where acceptance was deemed to have occurred as a result of the receiving bank's inactivity. After discussion, the Commission adopted the proposal.

139. A proposal was made to add a new subparagraph to paragraph (2) as follows:

> "( ) when the receiving bank makes a debit to an account of the sender with the receiving bank in order to cover the payment order;".

140. In support of the proposal, it was stated that a bank should not be allowed to debit the sender's account, and thus pay itself for the amount of the payment order, without being considered as having thereby accepted the payment order. However, it was stated that the use of the word "cover" might be inappropriate since the Model Law did not define the concept of "cover". After discussion, the Commission adopted the proposed new paragraph amended as follows:

> "( ) when the receiving bank makes a debit to an account of the sender with the receiving bank as payment for the payment order;".

141. The Commission also decided to replace the words "to cover" in subparagraph (2)(a) by the words "for payment of".

Paragraph (3)

142. It was suggested that a receiving bank should be given an extra day to consider the possibility of rejecting a payment order and to comply with its obligation to notify such rejection. Accordingly, it was proposed that in paragraph (3) the words "must be given not later than on the execution date" should be replaced by the words "must be given not later than on the business day following the execution date", and that in paragraph (2)(a) the words "when the time for execution under article 10 has elapsed" should be replaced by the words "when the time for giving notice of rejection under paragraph (3) below has elapsed".

143. In support of the proposal, it was stated that payment orders specifying that they were to be executed on the same day were often received by receiving banks together with payment from the sender so late in the day that it was impossible for the receiving bank to complete, within that day, the investigations that might have to be undertaken before a decision could be made as regards the possible rejection of the payment order. Under those circumstances, the rule currently found in subparagraph (2)(a) might overly burden the receiving bank by providing that failure to notify rejection of the payment order on the day it had been received would result in the receiving bank being deemed to have accepted that payment order. Furthermore, it was stated that giving the additional day for considering acceptance of a payment

order was necessary for the Model Law to remain in harmony with national and international rules aimed at detecting "money laundering" transactions. An example was given of a rule that required a bank in certain circumstances to inform an authority about a suspicious payment order and to delay executing the payment order for a certain period of time to permit the authority to determine the action it would take.

144. After discussion, the Commission adopted the proposal in principle. It was noted, however, that the issue of time of acceptance of payment orders could not be finally determined separately from the issue of time of execution of payment orders under article 10(1), since a payment order could not be executed before it was accepted. For the later discussion on article 10(1), see paragraphs 198 to 204, below.

145. A proposal was made to amend the current text of the paragraph so that the receiving bank would be under no obligation to notify its rejection of a payment order if it had not received payment for the payment order from the sender. In support of the proposal, it was stated that it would unduly burden the banks and might eventually slow down the entire credit transfer process to state that the receiving bank had a duty to notify the sender of a rejection even though sufficient funds had not been provided for payment of the payment order. In most cases the funds were provided soon thereafter. It was also noted that the current text contained no sanction relating to the failure by a receiving bank to comply with its obligation to notify the sender of a rejection where no funds had been received for payment. The proposal was objected to on the grounds that it might still be useful to maintain the principle of such an obligation in order to encourage action by receiving banks throughout the credit transfer chain and to provide certainty as to whether or not the payment order had been rejected. After discussion, the Commission adopted the proposal and referred it to the Drafting Group.

146. An additional proposal was made to insert a time limit after which payment orders would no longer be regarded as valid if the receiving bank had not received the corresponding payment. It was suggested that the validity period for such payment orders might be limited to five days. Another suggestion was that the matter should be left to agreement between the parties. After discussion, the Commission decided to adopt a provision to the effect that the validity of payment orders in the case where no payment had been provided to the receiving bank would, in principle, be determined by contract or other applicable legal rules and that, absent such a contract and such rules, the validity of such payment orders would be limited to five days.

147. An ad hoc Working Party, entrusted by the Commission to prepare a draft text reflecting those decisions, submitted the following text of paragraph (3) and a new paragraph (4):

> "(3) A receiving bank that does not accept a payment order is required to give notice of the rejection no later than on the business day following the execution date unless:
>
> > "(i) where payment is to be made by debiting an account of the sender with the receiving bank, there are insufficient funds available in the account to pay for the payment order; or

"(ii) where payment is to be made by other means, payment has not been received; or

"(iii) there is insufficient information to identify the sender.

"(4) A payment order is cancelled if it is neither accepted nor rejected under this article before the expiry of any period determined by law, agreement, or rule of a funds transfer system. If no such period is so determined, the payment order is cancelled at the close of business on the fifth business day after the execution date."

148. The Commission adopted the substance of the provisions submitted by the ad hoc Working Party and referred them to the Drafting Group.

149. It was observed that, by extending by one day the time period for giving notice of rejection, as it was done in the new version of paragraph (3), the question arose whether the receiving bank was allowed to benefit from keeping the funds it received from the sender as cover for the payment order without having to pay interest for the funds ("float") until the bank was deemed to have accepted the payment order. The Commission adopted the position that a bank ought not to benefit by not reacting to a payment order on the day it received it. The Commission agreed to add in article 10 a provision that would address the issue of "float" in accordance with that position of the Commission.

150. A view was expressed that the adoption of a rule limiting the validity of payment orders to a certain period of time might call for an additional rule determining the order in which the validity of different payment orders received on the same day would expire. For example, the matter might be settled either by a first-in/first-out rule or by a last-in/first-out rule. After discussion, the Commission was agreed that the Model Law should not attempt to regulate that matter, which would presumably be addressed by other provisions of national law.

151. The Commission adopted a proposal to replace the words "a sender's payment order" by the words "a payment order" and, as a consequence, the words "that sender" by the words "the sender".

Article 7

152. The text of draft article 7 as considered by the Commission was as follows:

"Article 7. Obligations of receiving bank that is not the beneficiary's bank

"(1) The provisions of this article apply to a receiving bank that is not the beneficiary's bank.

"(2) A receiving bank that accepts a payment order is obligated under that payment order to issue a payment order, within the time required by article 10, either to the beneficiary's bank or to an appropriate intermediary bank, that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner.

"(3) When a payment order is received that contains information which indicates that it has been misdirected and which contains sufficient information to identify the sender, the receiving bank shall give notice to the sender of the misdirection, within the time required by article 10.

"(4) When an instruction does not contain sufficient data to be a payment order, or being a payment order it cannot be executed because of insufficient data, but the sender can be identified, the receiving bank shall give notice to the sender of the insufficiency, within the time required by article 10.

"(5) If there is an inconsistency in a payment order between the words and figures that describe the amount of money, the receiving bank shall, within the time required by article 10, give notice to the sender of the inconsistency, if the sender can be identified. This paragraph does not apply if the sender and the bank have agreed that the bank would rely upon either the words or the figures, as the case may be.

"(6) The receiving bank is not bound to follow an instruction of the sender specifying an intermediary bank, funds transfer system or means of transmission to be used in carrying out the credit transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would cause excessive costs or delay in completion of the credit transfer. The receiving bank acts within the time required by article 10 if, in the time required by that article, it enquires of the sender as to the further actions it should take in light of the circumstances.

"(7) For the purposes of this article, branches and separate offices of a bank, even if located in the same State, are separate banks."

Paragraph (1)

153. The Commission adopted the text of the paragraph unchanged.

Paragraph (2)

154. It was proposed that a provision should be added to paragraph (2) requiring the receiving bank to execute the transfer in the currency or in the unit of account stipulated by the sender. The purpose of the addition was to clarify that intermediary banks were not allowed, without the consent of the interested party, to convert the funds received into a currency other than that in which the order was denominated. It was stated, in support, that, as a result of the automatic conversion of currencies by receiving banks in implementing credit transfers, customers might suffer loss and that the Model Law should contain a rule protecting the interests of customers. It was further stated that the automatic conversion of currencies was a source of disputes when the conversion had not been anticipated by the originator or the beneficiary. It was noted that banks that were not in a position to implement payment orders in different currencies had the possibility to reject the payment order or to derogate from the requirement in accordance with article 3.

155. In opposition to the proposal it was said that banks in some States, in acting upon incoming payment orders denominated in a foreign currency, regularly converted the amounts of the orders into the currency in which the bank normally operated. The proposed rule would interfere with that practice and in all likelihood would be contrary to the expectations of the beneficiary. Furthermore, the approach taken in drafting the Model Law had been to avoid dealing with issues concerning foreign exchange, and the adoption of the proposal would not be consistent with that approach. It was thought to be more appropriate to leave the question of conversion to the banking practice and to the laws governing the operations of the bank in question. It was further suggested that it was up to the originator and the beneficiary of a payment order to take into account such banking practices and laws and to make prior arrangements with the banks involved to ensure that a payment order would be implemented in a particular currency.

156. The Commission did not adopt the proposed addition to paragraph (2). While the Commission expressed understanding for the legislative policy that sought to protect the interests of customers who did not expect their payment orders to be converted into another currency, it considered it preferable not to deal in the Model Law with issues of foreign exchange and not to interfere with existing rules and practices on the matter. The Commission noted that, in light of the existing text of paragraph (2), according to which the receiving bank was obligated to implement a payment order in a manner that was "consistent with the contents of the payment order received", there could exist cases where the conversion of the currency of the payment order would not be regarded as a proper implementation of the payment order.

157. There was support for the proposal to add to paragraph (2) a provision according to which a receiving bank that accepted a payment order was obligated to take the steps necessary to ensure that funds for the implementation of the payment order were available to the next bank in the chain of the credit transfer. Such a provision was said to be desirable in order to ensure that the next bank would not delay the implementation of the payment order on the ground that it had not received funds to cover the order.

158. The prevailing view, however, was not to accept the proposal. It was considered to be sufficient for the Model Law to establish (in article 4(6)) an obligation of the sender to pay the receiving bank upon the acceptance by the receiving bank of the payment order. Furthermore, it was noted that it was implicit in paragraph (2), which provided that a receiving bank had to issue a payment order that "contained the instructions necessary to implement the credit transfer in an appropriate manner", that the receiving bank had to issue a payment order that had a reasonable chance of being accepted by the next bank in the credit transfer chain.

159. The Commission adopted the text of paragraph (2) subject to changing the words "an appropriate intermediary bank" to "an intermediary bank".

Paragraph (3)

160. A proposal was made to delete the paragraph. In support of the proposal, it was stated that the problem of misdirected payment orders did not need to be addressed in the Model Law. It was stated that, under article 16(3),

failure to give notice of misdirection of a payment order would have consequences only if payment had also been received. It was stated that, should such misdirection of both the payment order and the funds occur, the receiving bank would be under an obligation to notify rejection of the payment order under article 6(2)(a). After discussion, the Commission decided to delete the paragraph.

Paragraph (4)

161. A proposal was made to modify the current text as follows:

> "(4) When an instruction is received that appears to be intended to be a payment order but does not contain sufficient data to be a payment order or being a payment order cannot be executed because of insufficient data, but the sender can be identified, the receiving bank shall give notice to the sender of the insufficiency, within the time required by article 10."

162. In support of the proposal, it was stated that the current text was too widely drawn and covered instructions regardless of whether the receiving bank had appreciated that the provision applied. It was suggested that the proposed text should be amended to make it clear that the obligation of the bank to notify the sender of the insufficiency of the instruction would arise only if the bank had detected the insufficiency, while the bank would have no obligation to make specific enquiries for the detection of such insufficiency. It was noted that the Model Law provided no sanction for breach of the duty imposed on the receiving bank under the paragraph. Only if the receiving bank had been paid for the payment order might it have to pay interest under the Model Law. After discussion, the Commission adopted the proposal as amended and referred it to the Drafting Group. (As regards the reference to article 10, see the decision to add an extra day in article 10(1) as reported in paras. 198-204, below).

Paragraph (5)

163. The view was expressed that, in case of an inconsistency in a payment order between the words and the figures that describe the amount of money to be transferred, the Model Law should indicate whether words or figures should prevail. It was stated in support that the current provision was not restricted to situations where the inconsistency between the words and figures was in fact detected and the payment order was not executed but that it also governed cases where the inconsistency was not detected and the payment order was executed. It was not clear what the consequences were for the receiving bank or the sender in such a case. Any inconsistency between words and figures describing the amount of the payment order could properly be solved only by establishing a rule as to which description would govern. As to which description would govern, one proposal was to apply the traditional banking rule that words controlled over figures; another proposal was that, with a view to modern electronic means of transmitting payment orders where the orders were processed by number, the figures should control over the words.

164. The prevailing view, however, was not to accord priority to either words or figures. The current rule was the result of a delicate and balanced compromise; and if a bank did process payment orders by number only, it could contract with its customers to that effect.

165. A view was expressed that the first sentence was too restrictive and should be amended to cover, for example, the situation where the amount would be expressed in some form of code. The following wording was proposed:

> "(5) If there is an inconsistency in the information relating to the amount of money to be transferred, the receiving bank shall, within the time required by article 10, give notice to the sender of the inconsistency, if the sender can be identified."

166. It was suggested that the proposed text should be amended to make it clear that the obligation of the bank to notify the sender of the inconsistency between the words and the figures would arise only if the bank had detected the inconsistency, while the bank would have no obligation to make specific enquiries for the detection of such an inconsistency. After discussion, the Commission accepted the thrust of the proposal as amended.

167. The Commission subsequently considered a further proposal intended to reflect the deliberations and decisions on paragraph (5). That proposal read as follows:

> "(5) When a receiving bank detects that there is an inconsistency in the information relating to the amount of money to be transferred, it shall, within the time required by article 10, give notice to the sender of the inconsistency, if the sender can be identified. If a bank detects such an inconsistency but executes the payment order, it is also in breach of paragraph (2). Any interest payable under article 16(3) for failing to give the notice required by this paragraph shall be deducted from any interest payable under article 16(1) for failing to comply with paragraph (2). A bank that does not detect such an inconsistency and executes the payment order is not in breach of paragraph (2) if it otherwise complies with that paragraph."

168. With regard to the first sentence of the proposal, the Commission noted that the reference to article 10 needed to be reformulated so as to make it clear that reference was being made to article 10(2) and not to article 10(1). Subject to such a modification, the sentence was found to be acceptable. Dissatisfaction was expressed with regard to the rule in the second sentence on the ground that, in view of existing banking practice, it would place an undue burden on receiving banks involved in high-speed, high-volume, low-cost credit transfers, thus slowing down such transfers and raising their cost. Other grounds for dissatisfaction were that the second sentence failed to indicate what a receiving bank should do upon detection of an error and to distinguish between inconsistencies that were obvious on the face of the payment order and those that were more difficult to detect. In view of those reservations, the Commission decided to delete the second sentence.

169. Dissatisfaction was expressed with regard to the fourth sentence on the ground that a view was that it established a broad rule of immunity for banks that executed payment orders containing undetected inconsistencies without taking into account the possibility that failure to detect resulted from negligence or that the undetected inconsistency was obvious. In order to address that concern, it was suggested that the words "if the inconsistency is not obvious" should be added to the beginning of the sentence. It was pointed

out, however, that the fourth sentence could be read as implying that execution of a payment order after detection of an inconsistency constituted a breach of paragraph (2) and it should thus be deleted in view of the deletion of the second sentence. A contrary view was that banks in a high-speed system should be permitted to execute on the basis of figures and that the fourth sentence could be interpreted as preventing that. In view of those observations, the Commission decided to delete the fourth sentence.

170. After deliberation, the Commission adopted the first and third sentences of the text of paragraph (5) as embodied in the final proposal it had considered, and referred the paragraph to the Drafting Group.

Paragraph (6)

171. It was suggested that the Model Law should not allow a receiving bank to disregard the instructions of a sender, in particular regarding the use of a designated intermediary bank. It was stated that, in cases where the beneficiary's bank relied upon the receipt of funds at a designated intermediary bank, and consequently drew down on its account with the intermediary bank in reliance upon the expected receipt, an overdraft might be created and overdraft interest charges and other damages might result. The current text did not make it clear whether a receiving bank was entitled to choose another route without contacting the sender provided it acted in good faith, or whether it had to enquire of the sender what action it should take, in which case unilateral action would be at its own risk. As a consequence, a proposal was made to amend the paragraph as follows:

> "(6) If a receiving bank determines that it is not feasible to follow an instruction of the sender specifying an intermediary bank, funds transfer system or means of transmission to be used in carrying out the credit transfer, or that following such an instruction would cause excessive costs or delay in completing the credit transfer, the receiving bank shall be taken to have complied with paragraph (2) if it enquires of the sender what further actions it should take in the light of the circumstances, within the time required by article 10."

172. The proposal was objected to on the grounds that it would not permit the receiving bank to substitute its judgment for that of the sender, not only as regards the choice of an intermediary bank as did the current text, but also as regards the choice of a funds transfer system or means of transmission to be used in carrying out the credit transfer. A discussion ensued on whether the sender might be harmed by the receiving bank's unilateral decision not to follow the sender's instructions as regards the choice of a funds transfer system or a means of transmission. While support was given to the proposal that the receiving bank should have no freedom to deviate unilaterally from the instructions contained in the payment order, the prevailing view was that the receiving bank should be allowed to change unilaterally the means of transmission of the payment order, for example, if the purpose of the change was to permit timely execution of the payment order. It was therefore proposed that the words "or means of transmission" should be deleted from the proposal.

173. After discussion, the Commission adopted the proposal as amended and referred it to the Drafting Group. It also adopted the additional proposal to

delete the reference to article 10 from the paragraph so that no extra day would be given to the receiving bank to act in the circumstances described in the paragraph.

174. The Commission adopted the proposal to relocate the paragraph between paragraph (2) and paragraph (4).

Paragraph (7)

175. The Commission adopted the text of the paragraph unchanged.

Article 8

176. The text of draft article 8 as considered by the Commission was as follows:

> "Article 8. Acceptance or rejection by beneficiary's bank
>
> "(1) The beneficiary's bank accepts a payment order at the earliest of the following times:
>
> > "(a) when the time for [execution] under article 10 has elapsed without notice of rejection having been given, provided that: (i) where payment is to be made by debiting an account of the sender with the beneficiary's bank, acceptance shall not occur until there are funds available in the account to be debited sufficient to cover the amount of the payment order; or (ii) where payment is to be made by other means, acceptance shall not occur until the beneficiary's bank has received payment from the sender in accordance with article 5(b) or (c),
> >
> > "(b) when the bank receives the payment order, provided that the sender and the bank have agreed that the bank will [execute] payment orders from the sender upon receipt,
> >
> > "(c) when it notifies the sender of acceptance,
> >
> > "(d) when the bank credits the beneficiary's account or otherwise places the funds at the disposal of the beneficiary,
> >
> > "(e) when the bank gives notice to the beneficiary that it has the right to withdraw the funds or use the credit,
> >
> > "(f) when the bank otherwise applies the credit as instructed in the payment order,
> >
> > "(g) when the bank applies the credit to a debt of the beneficiary owed to it or applies it in conformity with an order of a court.
>
> "(2) A beneficiary's bank that does not accept a sender's payment order, otherwise than by virtue of subparagraph (1)(a), is required to give notice to the sender of the rejection, unless there is insufficient

information to identify the sender. A notice of rejection of a payment order must be given not later than on the [execution date]."

Paragraph (1)

177. The Commission decided that subparagraphs (a) to (c) should be aligned with article 6(2), including the new subparagraph added to article 6(2) (see paras. 139 and 140, above). It referred the matter to the Drafting Group.

178. A proposal was made that subparagraphs (d), (e) and (g) should be deleted since the actions described by those subparagraphs were already addressed in article 9(1). In reply, it was stated that article 9(1) addressed those actions as a part of the obligations of a beneficiary's bank that had accepted a payment order; the subparagraphs should be maintained under article 8 since they provided certainty as to the time when the beneficiary's bank accepted the payment order.

179. After discussion, the Commission adopted the text of subparagraphs (d) to (f). As regards subparagraph (g), a proposal was made to delete the words "to a debt of the beneficiary owed to it" so as to prevent a possible interpretation of the text that would allow the beneficiary's bank to accept the payment order by applying the credit to a debt of the beneficiary owed to it. It was stated that such an interpretation was not acceptable since the beneficiary's bank, when accepting a payment order, came under the obligation to transmit the credit for the disposal of the beneficiary. The bank should not, without the beneficiary's permission, be entitled to use the funds to settle its differences with the beneficiary. In reply, it was stated that, in view of article 9(1), the Model Law could not be interpreted as allowing the beneficiary's bank to set off the credit with a debt of the beneficiary, but only as stating that, should such a set-off be allowed, it would constitute payment under the Model Law. After discussion, the Commission did not adopt the proposal.

180. As regards the reference to an order of a court in subparagraph (g), a view was expressed that legal demands for the credit could be given not only by a court but also by other public authorities. A proposal was made to replace the words "in conformity with an order of a court" by the words "in conformity with an order of a court or another competent legal authority". After discussion, the Commission adopted the proposal.

Paragraph (2)

181. The Commission adopted the text of the paragraph subject to drafting changes to ensure conformity with the text of article 6(3). The matter was referred to the Drafting Group.

Article 9

182. The text of draft article 9 as considered by the Commission was as follows:

> "Article 9. Obligations of beneficiary's bank
>
> "(1) The beneficiary's bank is, upon acceptance of a payment order received, obligated to place the funds at the disposal of the beneficiary in accordance with the payment order and the applicable law governing the relationship between the bank and the beneficiary.
>
> "(2) When an instruction does not contain sufficient data to be a payment order, or being a payment order it cannot be [executed] because of insufficient data, but the sender can be identified, the beneficiary's bank shall give notice to the sender of the insufficiency, within the time required by article 10.
>
> "(3) If there is an inconsistency in a payment order between the words and figures that describe the amount of money, the beneficiary's bank shall, within the time required by article 10, give notice to the sender of the inconsistency, if the sender can be identified. This paragraph does not apply if the sender and the bank have agreed that the bank would rely upon either the words or the figures, as the case may be.
>
> "(4) Where the beneficiary is described by both words and figures, and the intended beneficiary is not identifiable with reasonable certainty, the beneficiary's bank shall give notice, within the time required by article 10, to its sender and to the originator's bank, if they can be identified.
>
> "(5) The beneficiary's bank shall on the [execution date] give notice to a beneficiary who does not maintain an account at the bank that it is holding funds for his benefit, if the bank has sufficient information to give such notice."

Paragraph (1)

183. A view was expressed that paragraph (1) might need redrafting to avoid conflict with article 8(1). It was stated that the paragraph was too broadly worded in that it implied, for example, that the beneficiary's bank would be under the obligation to place the funds at the disposal of the beneficiary even where, under article 8(1)(g), a court order might enjoin the bank from placing the funds at the disposal of the beneficiary. A proposal was made to add at the end of the paragraph the words "or to apply the credit in accordance with the applicable law". The Commission referred the proposal to the Drafting Group and recalled that the text of the paragraph should conform with the text of article 7.

Paragraphs (2) and (3)

184. The Commission adopted the text of paragraphs (2) and (3), subject to drafting changes by the Drafting Group so as to align the text of the paragraphs with article 7.

Paragraph (4)

185. It was suggested that it was not necessary to require a notice to be given to the originator's bank. The Commission agreed with the suggestion and adopted paragraph (4) subject to that modification.

186. It was observed that, with respect to the identity of the beneficiary, many banks processed payment orders on the basis of figures only. That practice was comparable to the practice of processing the amount of the payment orders by figures only (see para. 163, above). The Commission decided to take the approach taken in respect of article 7(5), i.e., to make it clear in article 9(4) that the beneficiary's bank would not be obligated to give notice if the bank operated on the basis of figures only and did not detect the inconsistency with the description of the beneficiary in words (see para. 166, above).

187. The Commission then considered the following proposed text intended to incorporate the decisions with regard to paragraph (4):

> "(4) When the beneficiary's bank detects that there is an inconsistency in the information that identifies the beneficiary, it shall, within the time required by article 10, give notice to the sender of the inconsistency, if the sender can be identified. If a bank detects such an inconsistency but executes the payment order, it is also in breach of paragraph (1). A bank that does not detect such an inconsistency and executes the payment order is not in breach of paragraph (1) if it otherwise complies with that paragraph."

188. In line with the decision with respect to article 7(5), the first sentence was found to be acceptable. On the same ground that it had been decided to delete the second sentence in the final proposed text of article 7(5), the Commission decided to delete the second sentence of the proposed text of paragraph (4). As regards the last sentence, a view was expressed that the reference to compliance with paragraph (1) was unsatisfactory because paragraph (1), rather than setting forth the substance of obligations of the beneficiary's bank, contained a reference to the applicable law governing the relationship between the bank and the beneficiary. It was also suggested that the last sentence was inadequate because it failed to provide for notification of the originators's bank in cases where the receiving bank's sender was itself an intermediary bank and did not possess the information needed to clarify the inconsistency. After deliberation, the Commission decided to delete the last sentence on the same ground as and in line with its decision to delete the last sentence of the final proposed text of article 7(5).

Paragraph (5)

189. The provision was supported since it expressed a duty that was in the interest of the proper functioning of credit transfers and that was owed by the beneficiary's bank to the sender.

190. Opposition was expressed to providing an obligation such as the one expressed in paragraph (5), and it was proposed that paragraph (5) should be deleted. It was stated that on a given day a major bank might receive

hundreds of payment orders concerning beneficiaries who did not maintain an account at that bank. In such a case it should be left to the bank to decide how it would discharge its obligation to execute the payment order. The bank might, for example, engage another bank to make the payment or to notify the beneficiary, or choose to pay by sending a cheque to the beneficiary. Since such acceptable practices might not be interpreted as discharging the obligation of giving notice as provided in paragraph (5), the Model Law would unduly interfere with them. It was noted that, since in the hypothesis of paragraph (5) there was no account relationship between the bank and the beneficiary, the bank had no practical possibility of modifying its duty through an agreement with the beneficiary.

191. It was observed that paragraph (5) provided that the bank was to give notice on the execution date, and that the time available to the bank for giving the notice was too short if the provision was interpreted to the effect that the notice was to reach the beneficiary on that date. It was therefore suggested that it should be made clear that the notice must be dispatched on the execution date, thereby putting the risk for loss or delay of the message on the beneficiary. The Commission agreed with the suggestion.

192. The Commission was agreed that, when the beneficiary's bank was instructed to make payment upon application by the beneficiary, the giving of notice as specified in paragraph (5) should not be required. It was decided to express that idea by inserting an opening phrase in paragraph (5) along the following lines: "(5) Unless the payment order states otherwise, the beneficiary's bank shall ...".

193. The Commission, after discussion, decided to adopt paragraph (5), subject to the modifications indicated in the preceding two paragraphs.

194. It was noted that article 16(6) referred to the liability for failure to perform the obligation of giving notice specified in article 9(5) and that such liability might entail an obligation to pay unliquidated damages by the beneficiary's bank. The Commission was agreed that the question of liability for failure to give notice under paragraph (5) would be considered in the context of article 16(6).

Article 10

195. The text of draft article 10 as considered by the Commission was as follows:

> "Article 10. Time for receiving bank to [execute] payment order and give notices
>
> "(1) A receiving bank is required to [execute] the payment order on the day it is received, unless
>
> > "(a) a later date is specified in the order, in which case the order shall be [executed] on that date, or

"(b) the order specifies a payment date and that date indicates that later execution is appropriate in order for the beneficiary's bank to accept a payment order and place the funds at the disposal of the beneficiary on the payment date.

"(2) A notice required to be given under article 7(3), (4) or (5) shall be given on or before the day the payment order is required to be executed.

"(3) A notice required to be given under article 9(2), (3) or (4) shall be given on or before the [payment date].

"(4) A receiving bank that receives a payment order after the receiving bank's cut-off time for that type of payment order is entitled to treat the order as having been received on the following day the bank [executes] that type of payment order.

"(5) If a receiving bank is required to take an action on a day when it is not open for the [execution] of payment orders of the type in question, it must take the required action on the following day it [executes] that type of payment order.

"(6) For the purposes of this article, branches and separate offices of a bank, even if located in the same State, are separate banks."

Paragraph (1)

196. The Commission decided to remove the square brackets around the word "execute" or "executed" in the article heading, the opening phrase of paragraph (1) and subparagraph (a).

197. The Commission reworded subparagraph (b) in the following way:

"(b) the order specifies a date when the funds are to be placed at the disposal of the beneficiary and that date indicates that later execution is appropriate in order for the beneficiary's bank to accept a payment order and execute it on that date."

198. The Commission engaged in a discussion whether paragraph (1) should provide that the receiving bank was required to execute a payment order on the day it received the order ("same-day rule") or whether paragraph (1) should require the receiving bank to execute the order as soon as possible but not later than the day following the day it received the order ("next-day rule").

199. The following arguments were advanced in favour of the same-day rule. The rule supported and stimulated the use of efficient banking procedures. Furthermore, a bank that was unable to process all payment orders on the day they were received could ensure, through the establishment of a suitable cut-off time according to paragraph (4), that payment orders received after a certain hour of a business day would be treated as having been received on the following day. In addition, article 3 of the Model Law allowed banks to derogate, by agreement with the customer or by an appropriate clause in the bank's general conditions, from the one-day rule and to establish a longer time period. Furthermore, the next-day rule enabled the receiving bank to

extend the period of the "float", i.e. the period during which the bank had the use of the funds without having to pay interest for them; in that connection, it was suggested that, if the next-day rule were to be adopted, it should be provided that, if the bank executed an order later than on the day the order was received, the bank should be obligated to credit the interest for the funds held by the bank more than one day. Moreover, it was noted that where there were several intermediary banks in the chain of a credit transfer, giving each receiving bank more than one day to execute orders may considerably slow down the funds transfer from the originator to the beneficiary. It was also said that, in view of the increased use of efficient electronic equipment in banking operations in developing as well as in developed countries, the Model Law would soon become outdated if it did not recognize the need for a rapid processing of payment orders.

200. The following arguments were advanced in favour of the next-day rule. The rule was realistic in that it took into account the fact that small or medium-size banks might not be in a position to comply with the same-day rule. The same-day rule might be appropriate for an electronic banking environment but not for the processing of paper-based payment orders. Furthermore, certain recommendations adopted in the European Communities for trans-border banking operations recognized the next-day rule. In addition, alleviating the rigour of the same-day rule by establishing a cut-off time according to paragraph (4) was not a good approach since it stimulated banks to set the cut-off hour early in the day. It was more appropriate to stimulate banks to set a late cut-off hour and execute as many payment orders as possible on the day the orders were received, while allowing the banks to postpone execution of certain kinds of orders to the next day. Furthermore, derogation from the same-day rule in accordance with article 3 was not a suitable way to allow banks to extend the period for execution of payment orders since they would have to explain and justify the derogation. By adopting a next-day rule, the Model Law would be acceptable also in States in which banks were not in a position to comply with the same-day rule. Moreover efficient banks would be able to improve their competitive position if they would make known that they were executing payment orders promptly.

201. After deliberation, the Commission adopted the solution according to which the receiving bank should in principle be obligated to execute a payment order on the day the order was received, but that an exception to that principle should allow execution of an order on the following day. Furthermore, it was decided that the bank executing an order on the following day should be obligated to enter the transaction in its books in such a way that the bank would not have the benefit of the use of the funds for an extra day without crediting interest for that day.

202. An ad hoc Working Party, entrusted by the Commission to prepare a draft text reflecting those decisions, submitted to the Commission a draft text to replace the opening phrase of paragraph (1) and a draft text of a new paragraph (1 _bis_) as follows:

> "(1) The receiving bank is required to execute the payment order on the business day it is received or, if not, at the latest on the business day after it is received, unless

> "(a) ...
>
> "(b) ...
>
> "(1 bis) When the receiving bank executes the payment order on the business day after it is received, otherwise than pursuant to subparagraph (1)(a) or (b), the receiving bank must do so for value on the date of receipt."

203. As to the opening phrase of paragraph (1), the Commission agreed with the policy that, on the one hand, it was desirable for the receiving bank to execute payment orders on the day they were received, but that, on the other hand, the bank should not be put in a position that it would have to justify execution of a payment order made on the following day. A proposal was made to express more clearly in paragraph (1) that it was desirable to execute payment orders on the day they were received. The proposal was to add, after the words "The receiving bank is required to execute the payment order" the words "if normally practicable" or "if reasonably practicable". While the proposal received some support, it was not accepted since it might bring into question the policy of not obliging the bank to justify execution of a payment order on the following day. The Commission decided, subject to review by the Drafting Group, to insert, in the opening phrase of paragraph (1), after the words "to execute the payment order", the words "in principle", and to replace here and in other appropriate places the term "business day" by the term "banking day".

204. As to the suggested paragraph (1 bis), it was pointed out that particular care was needed in translating the expression "for value on the date of receipt" in order to ensure that it would be understood properly. It was noted that, in obligating the bank to execute the order for value on the date of receipt, paragraph (1 bis) did not deal with the question whether the bank owed interest for executing the order a day later than on the day of receipt of the order. Paragraph (1 bis) required that the credit to the account should be made as if the order had been executed on the day of receipt of the order. The consequences of the requirement would be, for example, that the holder of the account could issue, on the day of execution of the order, a cheque against that credit, or could include, on that day, the credit in its financial reserve. The question whether the credit to the account bore interest, and at what rate, were separate questions that were not addressed by the Model Law. The Commission adopted paragraph (1 bis) and referred it to the Drafting Group.

Paragraphs (2) and (3)

205. It was proposed that paragraphs (2) and (3) should be reformulated along the following lines:

> "(2) A notice required to be given under article 7(4) or (5) shall be given as soon as possible but not later than the business day after the day the payment order is required to be executed.
>
> "(3) A notice required to be given under article 9(2), (3) or (4) shall be given as soon as possible but not later than the business day after the date specified in the payment order when the funds are to be placed at the disposal of the beneficiary."

206. It was suggested that an instruction mentioned in article 7(4), or in the equivalent provision in article 9(2), might not be considered a payment order because it did not contain sufficient data to be a payment order. The Commission agreed with the suggestion and requested the Drafting Group to formulate paragraphs (2) and (3) of article 10 in such a way that they would embrace payment orders as well as instructions that were not considered payment orders.

207. The Commission discussed the effect of, and possible interpretations that might be given to, the expression "as soon as possible" in paragraphs (2) and (3). After considering possible alternative wordings such as "in a reasonable period of time" or "promptly", the Commission decided to delete the expression since it was not necessary in view of the ultimate time limit provided in the two paragraphs.

208. It was suggested that the expression "execution date" should be used in paragraph (3) instead of the phrase "date specified in the payment order when the funds are to be placed at the disposal of the beneficiary".

209. In view of the adoption of the rule contained in article 10(1) allowing the receiving bank to use an extra day for the execution of a payment order (see para. 201, above), the question was raised whether the time-period in paragraphs (2) and (3) would be calculated from the day the payment order was received or from the following day. The Commission understood that the period should be calculated from the last day on which the payment order was to be executed. The Commission requested the Drafting Group to express that understanding in paragraphs (2) and (3).

210. Subject to the above decisions, the Commission adopted the substance of paragraphs (2) and (3).

Paragraph (4)

211. The Commission decided to remove the square brackets around the word "executes" and adopted paragraph (4).

Paragraph (5)

212. The Commission adopted paragraph (5).

Paragraph (6)

213. The Commission adopted paragraph (6). The question was raised whether, by treating branches and separate offices of a bank as separate banks for the purposes of article 10, a branch could, by routing electronic messages through the main office or another branch, in effect prolong the time periods provided in article 10. The Commission understood that such prolongation of time periods was not possible since the fact that a message received or sent by a branch was processed by or passed through the electronic communication system of the main office or of another branch did not make that message a further payment order or a message directed to another bank.

Article 11

214. The text of draft article 11 as considered by the Commission was as follows:

> "Article 11. Revocation
>
> "(1) A payment order may not be revoked by the sender unless the revocation order is received by a receiving bank other than the beneficiary's bank at a time and in a manner sufficient to afford the receiving bank a reasonable opportunity to act before the later of the actual time of execution and the beginning of the execution date.
>
> "(2) A payment order may not be revoked by the sender unless the revocation order is received by the beneficiary's bank at a time and in a manner sufficient to afford the bank a reasonable opportunity to act before the later of the time it accepts the payment order or the beginning of the payment date.
>
> "(3) Notwithstanding the provisions of paragraphs (1) and (2), the sender and the receiving bank may agree that payment orders issued by the sender to the receiving bank are to be irrevocable or that a revocation order is effective only if it is received by an earlier point of time than provided in paragraphs (1) and (2).
>
> "(4) A revocation order must be authenticated.
>
> "(5) A receiving bank other than the beneficiary's bank that executes or a beneficiary's bank that accepts a payment order that has been revoked is not entitled to payment for that payment order and, if the credit transfer is completed in accordance with article 17(1), shall refund any payment received by it.
>
> "(6) If the recipient of a refund under paragraph (5) is not the originator of the transfer, it shall pass on the refund to the previous sender.
>
> "(7) If the credit transfer is completed in accordance with article 17(1) but a receiving bank [executed] a revoked payment order, the receiving bank has such rights to recover from the beneficiary the amount of the credit transfer as are otherwise provided by law.
>
> "(8) The death, bankruptcy, or incapacity of either the sender or the originator does not of itself, operate to revoke a payment order or terminate the authority of the sender. The word "bankruptcy" includes all forms of personal, corporate and other insolvency.
>
> "(9) For the purposes of this article, branches and separate offices of a bank, even if located in the same State, are separate banks."

Paragraphs (1) and (2)

215. A view was expressed that the article might need redrafting as a result of the change introduced in the rule contained in article 10(1) allowing the

receiving bank to use an extra day for the execution of a payment order. It was stated that, although the current text of the Model Law provided no definition of the execution date, the text would, in all likelihood, be interpreted as providing that execution should take place by the end of the day following the day when the payment order was received. It was stated that the beginning of the execution date referred to in the paragraphs would, under those circumstances, be interpreted by the banks as the beginning of the last day open for effective execution of the payment order. Thus, if a revocation order could be binding upon the banks if received by the beginning of the second day, banks would tend to protect themselves against a possible liability by executing all payment orders on the second day provided in article 10(1). It was stated that, while the Commission had decided to maintain the principle of same-day execution under article 10, the above interpretation would introduce a bias toward later execution.

216. A proposal was made to replace the words "and the beginning of the execution date" at the end of paragraph (1) and "or the beginning of the payment date" at the end of paragraph (2) by the words "and the earliest of the dates provided for execution under article 10(1)". Although support was given to the proposal, the prevailing view was that a reference to two possible dates of execution would contradict the principle of same-day execution. For the same reason, the Commission decided not to replace the reference to the execution date by a reference to an execution period and not to rely on a distinction between the day when the bank was entitled to execute and the day when it was obligated to execute. After discussion, the Commission decided to replace the ending words of the paragraphs by the words "or the beginning of the day on which the payment ought to have been executed under article 10(1)(a) or (b), if later".

217. A discussion took place as to whether the Model Law should address the legal issues arising out of a possible amendment of a payment order. It was recalled that the Working Group had noted that amendment of payment orders might raise additional policy issues to those raised by the revocation of payment orders. It was stated that, should the issues of amendment be addressed, there would be a need for a complete set of rules governing the content of the amendment and the rights and obligations of the bank that received an amendment, and for providing a sanction for those rights and obligations. It was suggested that it might be too late to consider such new issues. It was noted that, while amendments were not expressly mentioned by the current text, they were not precluded by the Model Law and that the matter could be dealt with by agreement between the parties to a credit transfer.

218. A concern was expressed that some difficult issues might arise regarding amendments, for example, in the case where the purpose of the amendment was to increase the amount of the credit transfer. In reply, it was stated that most funds transfer systems would regard such an amendment as a new payment order issued as a complement of the first one for the extra amount, whereas most other amendments would be analysed as the combination of a revocation order concerning the initial payment order, followed by a new payment order containing the new instructions. It was thus stated that, under most circumstances, amendments could be dealt with under the rules concerning the issuance or the revocation of payment orders.

219. It was stated, however, that in current banking practice, amendments of payment orders were considerably more numerous than revocations and that there existed no reason why the Model Law should focus on the issues of revocation without addressing those of amendment. It was also stated that the legal problems raised by amendments of payment orders could easily be dealt with in the Model Law. In most cases, the matter could appropriately be taken care of by mentioning that the rules applicable to revocation would also apply to an amendment.

220. It was suggested that, if the Commission decided not to include a provision on amendment in the Model Law, it should at least adopt a general provision along the lines of article 7(2) of the United Nations Convention on Contracts for the International Sale of Goods, to the effect that the question of amendment as well as other questions concerning matters governed by the Model Law that would not be expressly settled in it would be settled in conformity with the general principles on which it was based. (See paras. 100-103.)

221. After discussion, the Commission decided to add the following provision to the text of the article:

> "The principles contained in this article will apply to the amendment of a payment order".

222. It also decided to discuss the possible insertion of a general provision along the lines of article 7(2) of the United Nations Convention on Contracts for the International Sale of Goods at a later stage of its proceedings.

Paragraph (3)

223. The Commission adopted paragraph (3).

Paragraph (4)

224. Some support was expressed for the deletion of paragraph (4). It was thought to be unnecessary since it was understood that, for a bank to act upon a revocation order, the bank would have to be assured that the order was issued by or on behalf of the sender. The prevailing view, however, was that paragraph (4) was useful in that it clarified that the bank had a right to require a revocation order to be authenticated. Such a right was necessary since the bank had no other choice but to act upon a revocation order whereas it was authorized to reject an unauthenticated payment order.

225. It was generally understood that the method of authenticating a revocation order did not have to be the same as the method of authenticating the payment order being revoked. The Commission decided that that understanding should be expressed in paragraph (4) and requested the Drafting Group to prepare an appropriate formulation.

Paragraph (5)

226. The Commission adopted the paragraph, subject to making it clear in the text that, for paragraph (5) to operate, the revocation had to be effective under the provisions of paragraphs (1) and (2) of article 11. The Drafting Group was requested to revise the text of paragraph (5) accordingly.

Paragraph (6)

227. The Commission adopted the substance of paragraph (6). The Commission requested the Drafting Group to revise the paragraph with a view to ensuring that it was clear that the provision operated repeatedly with respect to each recipient in order to ensure that the refund would be returned to the originator. It was suggested that the Drafting Group should replace in paragraph (6) the word "transfer" by the expression "credit transfer".

New paragraph (6 bis)

228. A proposal was made to include in article 11 a rule that would take into account the possibility that a bank making a refund would consider it appropriate to skip the previous sender and would make the refund directly to the originator or to another sender in the chain of the credit transfer. It was proposed that such a rule ("skip-rule") might be drafted along the following lines:

> "(6 bis) Without prejudice to its obligations under any agreement that nets obligations bilaterally or multilaterally, a bank that is obliged to make a refund to its sender under paragraph (5) is discharged from that obligation to the extent that it makes the refund direct to a prior sender; and any bank subsequent to that prior sender is discharged to the same extent."

229. A purpose of the proposed skip-rule was said to be to provide a solution when the direct refund to an intermediary bank or to the originator was the most practical solution. Another purpose was to allow the refunding bank not to pay the refund to an intermediary bank that had become insolvent; a refund to such a bank might defeat the ultimate purpose of the refund, which was to transfer the money back to the originator.

230. It was noted that the scope of the proposed text was limited in two directions. First, the opening phrase made it clear that the skip-rule did not operate when it was inconsistent with any bilateral or multilateral agreement through which banks netted their obligations arising out of payment orders. Secondly, the rule did not constitute a general authorization for a refund to a sender other than the previous sender; the rule merely provided that, when a bank chose to skip a sender, which the bank would do taking into account the circumstances of the case and its obligations towards the participants in the particular credit transfer chain, the bank would be discharged from its obligation to make the refund.

231. The proposed text of the skip-rule was opposed on the ground that the rule might be incompatible with the rules of a funds transfer system or the rights and obligations of an intermediary bank participating in a bilateral or multilateral netting arrangement. It was stressed that the future development of international credit transfers, in particular computer-assisted credit transfers, would place greater emphasis on multilateral and bilateral netting arrangements, and that a provision such as the one proposed might interfere with such arrangements. It was also stated that such a rule could not operate with certain funds transfer systems and that the rule would therefore conflict with emerging commercial methods. Furthermore, the Model Law should not attempt to deal in an incomplete and unsuitable manner with a situation that involved national laws on insolvency and bankruptcy.

232. In support of the proposed text, it was said that, once the payment orders relating to a particular credit transfer were settled, the manner in which any refund would be made would not affect the netting arrangement. Since the settlements under the computer-assisted netting arrangements were usually made daily, the possibility of interference of the skip-rule with the netting arrangement was not substantial. To the extent the possibility of such interference existed, the opening phrase making the skip-rule subject to any agreement binding upon the bank making the refund should ensure that interference did not in fact occur.

233. An observation was that the concept of netting, which was referred to in the opening phrase, was vague and that the question of the effectiveness of netting schemes could not be fully resolved by the Model Law since several national legal systems might be relevant in determining that question. The Commission took note of the observation and decided that the opening phrase should not specifically mention netting.

234. After deliberation, the Commission adopted the substance of the proposal and decided that the text should read along the following lines:

> "(6 bis) A bank that is obliged to make a refund to its sender under paragraph (5) is discharged from that obligation to the extent that it makes the refund direc[illegible] a prior sender; and any bank subsequent to that prior sender is discharged to the same extent. This paragraph does not apply to a bank if it would affect the bank's rights or obligations under any agreement or rule of a funds transfer system."

235. An additional proposal was made for providing that the originator had a direct claim for refund against the bank that was obligated to make the refund as a result of a revocation of the payment order. Such a direct claim was considered necessary to protect the interests of the originator who might otherwise find it difficult to prevent (e.g., through court ordered interim measures) the refund being made to an intermediary bank that might not be able, because of insolvency, to make the next refund. A direct claim by a non-bank originator would also have the possible advantage of falling under a national deposit insurance scheme. The Commission adopted the substance of the proposal and referred it to the Drafting Group.

Paragraph (7)

236. The Commission adopted the paragraph. (As to the later decision to replace the words "as are otherwise provided by law" by the words "as may otherwise be provided by law", see para. 276, below).

Paragraph (8)

237. A question was raised as to the necessity for referring to the originator since, in accordance with article 2(e), the term "sender" encompassed an originator. In response, it was pointed out that the independent reference to the originator was intended to make clear that death, bankruptcy or incapacity of an originator, as distinct from senders such as the originator's bank or an intermediary bank, would not result in a termination of authority relating to payment orders issued by such senders.

238. The appropriateness of the term "revocation" was questioned on the ground that revocation of a payment order required a degree of initiative beyond the capacity of a dead, bankrupt or incapacitated originator or sender. It was decided to retain the present formulation since its meaning was clear and since in some legal systems events of the type referred to in the paragraph may operate to revoke a payment order by operation of law.

239. A suggestion was made to broaden the language of the paragraph so as to indicate that the occurrence of an event of the type referred to would not result in the revocation of the credit transfer, rather than merely not resulting in the revocation of a payment order. It was decided, however, that the proposed change was unnecessary because the meaning of the provision was sufficiently clear. A further reason for not adopting the proposed language was that the Model Law recognized the concept of the revocation of a payment order, but did not contain any provisions on revocation of a credit transfer.

240. It was suggested that the reference to "corporate insolvency" needed to be elaborated to make clear that the paragraph referred to insolvency of all types of legal entities that might act as originators or senders. That suggestion was referred to the Drafting Group.

241. After deliberation, the Commission adopted the text of the paragraph and referred it to the Drafting Group.

Paragraph (9)

242. A view was expressed that the paragraph was drafted in an overly broad fashion. In particular, it was suggested that the scope of the rule that branches and separate offices of a bank were to be considered separate banks for the purposes of article 11 should be limited to paragraphs (1) and (2), since some of the obligations treated in other paragraphs were of a monetary nature. With respect to such obligations it would not necessarily be appropriate to treat branches of a bank as separate banks. In response, it was pointed out that application of the rule in paragraph (9) to paragraphs (5) and (6) would also be appropriate. The Commission decided to adopt the paragraph with the understanding that it related to operational matters and that questions of financial liability and similar matters concerning branches or the head office of a bank were beyond its purview.

Article 12

243. The text of draft article 12 as considered by the Commission was as follows:

> "Article 12. Duty to assist
>
> "If the credit transfer is not completed in accordance with article 17(1), each receiving bank is obligated to assist the originator and each subsequent sending bank, and to seek the assistance of the next receiving bank, in completing the credit transfer."

244. Divergent views were expressed concerning the duty to assist. One view was that the provisions of the article should not be left open to variation by

agreement between the parties. The provisions of article 12 should constitute a minimum standard of protection of the originator against the consequences of a failure in the credit transfer.

245. Another view was that the article should be deleted. In support of the proposal, it was stated that the current rule on the duty to assist was vaguely worded and that it was unclear whether there existed a sanction to it. The whole matter of assistance should be left to good banking practice and to competition in the banking market. It was suggested that, should the article be maintained, the extent of the duty to assist should be limited so that a receiving bank would have a duty to assist only its sending bank and its receiving bank. Moreover, the article should indicate clearly that there existed no liability for failure to comply with the duty to assist.

246. The prevailing view, however, was that the principle of a duty for the receiving banks to assist in case of non-completion of a credit transfer should be retained. A suggestion was that, if the credit transfer was not completed, it would be indispensable to collect information as to the location of the funds or the cause of the failure. Thus, the words "in particular by offering and gathering necessary information such as the whereabouts of the funds" should be added before the words "in completing the credit transfer". In reply, it was stated that there was no need to adopt the proposal since the duty to collect information was already implied in the text.

247. Another proposal was that the words "If the credit transfer is not completed in accordance with article 17(1)" should be replaced by the words "Until the credit transfer is completed in accordance with article 17(1)". It was stated that, while the duty to refund under article 13 arose only where it was clear that the transfer would not be completed, the duty to assist should continue until the credit transfer was completed. After discussion, the Commission adopted the proposal.

248. As regards the scope of the duty to assist, the view was expressed that the Model Law should not attempt to modify the existing banking practice but simply take that practice into account. It was stated that the current wording might suggest that the purpose of the article was to create a legal duty that, under different jurisdictions, might be regarded either as a statutory duty or as an implied contractual duty and might entail liability of the receiving bank in case of breach of that duty. A concern was expressed that such misinterpretation of the article might lead to burdening the receiving bank with an unlimited duty that might, for example, include the obligation to join legal procedures that the originator might have started as a consequence of the failure of the credit transfer. A proposal was made to replace the words "each receiving bank is obligated to assist" by the words "each receiving bank is obligated to use its best efforts to assist". In support of the proposal, it was stated that such wording would mitigate the concern expressed about the possible liability of the receiving bank. Another proposal to the same effect was to replace the words "the receiving bank is obligated to assist" by the words "the receiving bank has a duty to assist" and the words "in completing the credit transfer" by the words "in completing the banking procedures of the credit transfer". After discussion, the Commission adopted the latter proposal.

249. As regards the possible sanction of the duty to assist, it was stated that article 16(8) should make it clear that it did not apply to failure by a bank to comply with its duty to assist under article 12. Although a concern was expressed that the Model Law should also indicate, particularly for the use of bank supervisory authorities, what the sanction of article 12 might be, the Commission decided not to indicate any sanction for breach of the duty to assist.

Article 13

250. The text of draft article 13 as considered by the Commission was as follows:

> "Article 13. Duty to refund
>
> "(1) If the credit transfer is not completed in accordance with article 17(1), the originator's bank is obligated to refund to the originator any payment received from it, with interest from the day of payment to the day of refund. The originator's bank and each subsequent receiving bank is entitled to the return of any funds it has paid to its receiving bank, with interest from the day of payment to the day of refund.
>
> "(2) The provisions of paragraph (1) may not be varied by agreement. However, a receiving bank shall not be required to make a refund under paragraph (1) if it is unable to obtain a refund because an intermediary bank through which it was directed to effect the credit transfer has suspended payment or is prevented by law from making the refund. The sender that first specified the use of that intermediary bank shall have the right to obtain the refund from the intermediary bank."

Article as a whole

251. It was noted that the policy behind the duty to refund as established by article 13 was to strengthen the trust by the users in the credit transfer system. It was stated, however, that that goal could also be achieved by other legal solutions and that such a policy would not justify the restriction of the freedom of contract.

252. Several concerns were expressed with respect to article 13, which permitted the bank to escape the duty to refund only in the narrowly circumscribed situation of paragraph (2). One concern was that the rule introduced an absolute obligation that did not depend on any wrongdoing by the bank obligated to make the refund; in effect, the rule placed on that bank a risk for actions of another bank on which the first bank might not have any influence. A view was expressed that the rule would contradict basic principles of law in some countries. A related concern was that actions of banks in an economically unstable country, or actions of banks that were not run properly, might place in a precarious position a bank that was economically sound and run properly. A further concern was that a bank, in order to avoid the risk imposed on it by article 13, might be tempted to encourage customers to send funds by cheque rather than by a credit transfer system. Furthermore, article 13 might have repercussions in the area of

company law and the law of liability of bank directors and employees towards their bank for their decisions that resulted in the bank having to make the refund. In addition, national insurance schemes for certain types of risks in banking operations normally covered only claims from non-bank customers; the claims made under the second sentence of article 13(1), which were inter-bank claims, would thus not be covered by such national insurance schemes. It was also stated that the money-back guarantee might have repercussions on the requirement for capital imposed by banking supervisory law in some countries. In that connection, however, it was noted that, in response to an inquiry, the Secretary of the Basle Committee on Banking Supervision had written to the Secretary of the Commission that members of the Committee did not feel that the 1988 Capital Accord would require banks to include any risks arising out of article 13 as a contingent liability with capital weight. The letter had gone on to say that a further review of the question might become necessary both by supervisors in particular countries and perhaps by the Committee should the risk become material (see A/CN.9/347/Add.1).

253. In light of those concerns, four proposals were made. One proposal was to allow the parties, in accordance with article 3, to agree that the provisions of the Model Law on the money-back guarantee would not apply. Another proposal was to allow the banks to offer to their customers an alternative between one type of credit transfer under which the bank would assume the risk established by article 13 and the other type under which the bank would contract out of that risk. To reflect the risk, the bank would charge more for the first type of credit transfer. The third proposal was to not impose an absolute liability on the originator's bank, but instead to establish a direct claim for refund by the originator against the bank which held the funds after it had been established that the credit transfer could not be completed. Such a direct claim would avoid the need for inter-bank claims envisaged in the second sentence of article 13(2) and would have the advantage that it might be covered by a national insurance scheme covering the liability of the bank. The fourth proposal was to limit the obligation of the originator's bank to make the refund when the credit transfer was not completed because of a malfunction in the system for the electronic transfer of messages between the banks. In such a case, the entity operating the electronic message system was likely to have excluded or limited its liability. Article 13 should not be allowed to operate when the originator's bank would be unable to recover the amount to be refunded to the originator from the entity operating the electronic message system.

254. In reply to those concerns and proposals, and in support of the concept of article 13, it was said that a rule comparable to the one contained in article 13 had been introduced in the legal system of a country with active credit transfer systems and that the rule did not appear to have created problems. Furthermore, to allow banks to offer two types of credit transfers might discourage many customers from using the transfer that included the obligation under article 13, in particular if that kind of transfer would be offered at an excessive price; low volume of such transfers, in turn, might lead to a further increase in the charges, which might make the price for a transfer that offered the protection of article 13 prohibitive. Such a result, it was stressed, would be contrary to the policy of article 13 to increase the trust of customers in the credit transfer system. By way of counter-argument, and in support of allowing the banks to charge an additional fee for payment orders that enjoyed the protection of article 13, it was

suggested that article 13 might require the bank to offer that protection against adequate or reasonable charge. A further statement in support of article 13 was that, by allowing a wide possibility of contracting out, the originator would bear the risk of having to seek refund through litigation in a foreign country, a risk that the originator's bank was better equipped to bear. It was also observed that article 13 was important in maintaining the balance between the provisions of the Model Law that accommodated the interests of the banks and the provisions that protected the interests of the customers.

255. In order to bridge the opposing views, a proposal was made to add an exception to the prohibition to contract out of article 13(1). The proposal was to modify the first sentence of paragraph (2) along the following lines:

> "The provisions of paragraph (1) may not be varied by agreement, except where a prudent originator's bank would not have otherwise accepted a particular payment order because of a significant risk involved in the credit transfer".

256. A concern was expressed that the proposed modification might create uncertainty in interpreting the concepts of "prudent bank" and "significant risk". Furthermore, banks might attempt to contract out of their duty by routinely including clauses in their contracts to the effect that the payment order in question gave rise to such a degree of risk that a prudent bank would not accept the order. Such a clause, even if it would ultimately not be recognized as valid in court, would shift onto the customer the burden of proving that the bank was not permitted to contract out of its obligation under article 13(1).

257. Some of those who shared those concerns were in favour of retaining article 13 as prepared by the Working Group. Others supported a suggestion according to which the proposed modification of the first sentence of paragraph (2) should be amended so as to make it clear that contracting out was allowed only in exceptional circumstances and in the case of an unusual risk. That suggestion initially received considerable support. In subsequent discussion, however, observations were made that, if contracting out was possible only in exceptional cases and where there was an unusual risk, the bank would not be able to contract out when risks in credit transfers to a certain country or through certain banks were not exceptional or unusual. In view of those observations, the Commission decided not to adopt the amendment referring to exceptional circumstances and unusual risks. In reaction to that decision, it was pointed out that, by not adopting the amendment, which would restrict contracting to only exceptional circumstances, the door might be opened to systematic contracting out by banks.

258. After deliberation, the Commission decided to adopt the proposal reflected above in paragraph 255.

Second sentence of paragraph (1)

259. It was stated that the sentence did not deal with the bank that had rejected a payment order. While it was obvious that the receiving bank had an obligation to return any funds that might have been paid to it, it was stated that this should be done without the receiving bank being obliged to pay interest.

260. A suggestion was made to provide that the right to the return of any funds pursuant to the second sentence of paragraph (1) should not be given to the bank that, because of an error or fraud, issued a payment order that identified a wrong person as the beneficiary. By the suggested provision, the risk of recovery of the money paid to the wrong person would fall upon the bank at which the problem occurred, i.e., the bank that had issued a payment order inconsistent with the payment order accepted by it.

261. In opposition to the suggestion it was stated that article 13 was addressed to the situation in which, at the moment it became known that the transfer would not be completed, the funds were held by one of the banks in the credit transfer chain. The suggested provision, on the other hand, dealt with a case where the money was in the hands of a third person. The case in which money was to be recovered from a third person, whose refusal to return the money was in all likelihood not in good faith, gave rise to considerations that fell outside the purview of article 13. Furthermore, the proposal introduced an element of wrongdoing, while article 13 operated irrespective of any wrongdoing by a bank. In addition, it was noted that article 13 did not cover some other situations in which the originator might claim the return of money (e.g., when the bank to which a person made a payment to cover a credit transfer refused to accept the payment order, or when a bank legitimately contracted out of article 13). In those situations the return of money might be based on rules other than article 13 (e.g. rules on unjust enrichment).

262. After deliberation, the Commission decided not to adopt the suggested provision and to leave the case envisaged by it and other similar cases to the applicable law.

Second sentence of paragraph (2)

263. A suggestion was made to mention the beneficiary's bank, in addition to the intermediary bank, in the second sentence of paragraph (2). The Commission did not adopt the suggestion for two reasons. First, originators, when making out payment orders, virtually always indicated the beneficiary's bank; they usually did so not because they had a preference for that bank, but because the beneficiary requested the payment to be made to that bank. In such circumstances it would be unfair to let operate the exception provided in the second sentence of paragraph (2). Secondly, a non-reimbursing receiving bank would be the beneficiary's bank only if that bank had received payment for the payment order from its sender but had not accepted the order, a situation that would rarely arise.

264. Another suggestion was to deal in the second sentence of paragraph (2) with a situation in which a bank that had suspended payment or was prevented by law from making the refund was not the bank through which the originator directed the transfer to be made. The suggestion was to provide that the duty of the originator's bank to make the refund would fall away always when the originator "directed" the use of a bank even if that bank was not the one that had suspended payment or was prevented by law from making the refund. The Commission did not adopt the suggestion.

265. The Commission considered a possibility that the duty to make a refund might be excluded where an originator's bank systematically caused all or the majority of its customers to "direct" the bank as to the routing to be used to

effect the credit transfer. In order to give effect to such practice, the Commission decided to add a new sentence between the second and third sentences of paragraph (2) along the following lines:

> "A receiving bank is not considered to have been directed to use the intermediary bank unless the receiving bank proves that it does not systematically cause the type of senders or payment orders involved in the transfer to instruct it as to the intermediary bank or banks to be used."

Proposal for including "skip-rule"

266. It was recalled that the Commission had decided to include in article 11 a skip-rule, according to which a bank making a refund could skip the previous sender and make the refund to an earlier sender in the credit transfer chain (see paras. 228-235, above). There was wide agreement that a similar rule should be adopted in article 13, in particular for the purpose of allowing the refunding bank to avoid making the refund to an intermediary bank that had become insolvent. The proposed skip-rule for article 13 was opposed on essentially the same grounds as the rule was opposed in the context of article 11 (see paras. 231 and 233, above).

267. The Commission decided to add to article 13(1) a rule along the following lines:

> "A bank subsequent to the originator's bank which is obliged to make a refund to its sender is discharged from that obligation to the extent that it makes the refund direct to a prior sender; and any bank subsequent to that prior sender is discharged to the same extent. This paragraph does not apply to a bank if it would affect the bank's rights or obligations under any agreement or rules of a funds transfer system."

268. The Commission also decided to adopt the substance of the additional proposal to accord to the originator a direct claim against the obligated bank, as done in respect of the skip-rule in the context of article 11 (see para. 235, above).

Article 14

269. The text of draft article 14 as considered by the Commission was as follows:

> "Article 14. Correction of underpayment
>
> "If the credit transfer is completed in accordance with article 17(1), but the amount of the payment order executed by a receiving bank is less than the amount of the payment order it accepted, it is obligated to issue a payment order for the difference between the amounts of the payment orders."

270. A proposal was made to delete the words "the credit transfer is completed in accordance with article 17(1), but". In support of the proposal, it was

stated that, subject to the provisions of article 17(3), a credit transfer could not be seen as completed in the case where the full amount stipulated by the originator had not been transferred. A view was expressed that there could be no partial completion of the credit transfer and the opening words of the article thus contradicted both paragraphs (1) and (3) of article 17 (see paras. 280-286, below).

271. It was also stated that the proposal to delete the reference to the completion of the credit transfer in accordance with article 17(1) would need to be considered in relation with article 16(5) and that a similar proposal would be made regarding article 16(5). After discussion, the Commission decided to adopt the proposal, subject to reconsideration after discussion of articles 16(5) and 17(1).

272. Another proposal was that the article should be deleted altogether since the obligation for a receiving bank to issue a payment order for an amount identical to that of the payment order it had received already existed under article 7(2). The proposal was objected to on the grounds that article 7(2) did not specify with sufficient clarity the action required of a receiving bank for correcting underpayment. After discussion, the Commission decided to postpone its final decision regarding the article until it had discussed the issues arising under articles 16(5) and 17. Subsequently, the Drafting Group deleted the words as suggested in paragraph 270.

Article 15

273. The text of draft article 15 as considered by the Commission was as follows:

> "Article 15. Restitution of overpayment
>
> "If the credit transfer is completed in accordance with article 17(1), but the amount of the payment order executed by a receiving bank is greater than the amount of the payment order it accepted, it has such rights to recover from the beneficiary the difference between the amounts of the payment orders as are otherwise provided by law."

274. The Commission considered the possibility of deleting article 15 on the ground that, in view of the reference to completion of the credit transfer in accordance with article 17(1), article 15 dealt with a situation outside of the scope of the Model Law. It was also suggested that the provision could be regarded as superfluous because the right of restitution of overpayment was implicit in article 7(2). A question was also raised as to the justification for including an express provision on one particular case while other situations in which a need for restitution of payment might arise were not dealt with. Based on that question, it was suggested that the article might be expanded to regulate other situations in which a need for restitution of payment might arise, for example, where an error by some bank had resulted in payment to the wrong person. The prevailing view, however, was that retention of a text along the lines of the present article was desirable. It was felt that such a provision would provide an answer as to the disposition of the overpayment. It was also felt that retention of article 15 was necessary in light of article 16(8), which provided that the remedies under the Model Law were exclusive.

275. A concern was expressed that retention of the reference in article 15 to completion of the credit transfer in accordance with article 17(1), while a similar reference was deleted in article 14, might have the unintended effect of giving rise to the inference that a credit transfer resulting in an underpayment was not to be deemed completed (see above, para. 270). It was felt that such an inference would be inappropriate because the factors used in article 17(1) to determine completion of a credit transfer referred to the moment of acceptance of the payment order by the beneficiary's bank and not to the quantity of the payment order. It was suggested that the Drafting Group should review the text with a view to addressing that concern.

276. It was proposed that article 15 should be narrowed so that restitution would be obligatory only if the beneficiary was aware of the overpayment and had been unjustly enriched. It was agreed, however, that the Model Law did not have to address that matter since, pursuant to article 15, such particular questions would be governed by the applicable law other than the Model Law. It was felt to be necessary, however, to replace, in the reference to the applicable law, the words "as are otherwise provided by law" by the words "as may otherwise be provided by law" in order to avoid the implication that restitution of overpayment would be available in all national legal systems. A similar modification of article 11(7) was also agreed upon.

277. After deliberation, the Commission adopted the text of article 15, subject to replacing the words "as are otherwise provided by law" by the words "as may otherwise be provided by law".

Article 16

278. A proposal was made to replace the text of the article by the following provisions:

> "Article 16. Liability for interest
>
> "(1) A receiving bank other than the beneficiary's bank that fails to comply with its obligations under article 7(2) is liable to the beneficiary if the credit transfer is completed under article 17(1). The liability of the receiving bank is to pay interest on the amount of the payment order for the period of delay caused by the receiving bank's failure. However, if the delay concerns only part of the amount of the payment order, the liability shall be to pay interest on the amount that has been delayed.
>
> "(2) The liability of a receiving bank under paragraph (1) may be discharged by payment to its receiving bank or by direct payment to the beneficiary. If a receiving bank receives such payment but is not the beneficiary of the transfer, the receiving bank shall pass on the benefit of the interest to the next receiving bank or, if it is the beneficiary's bank, to the beneficiary.
>
> "(2 *bis*) For the purposes of this law and notwithstanding article 4(6) a bank is considered to have failed to comply with its obligation under article 7(2) if a delay is caused by its failure to pay for a payment order. Where payment is to be made by debiting the bank's account with

its receiving bank, failure to pay means failure to put funds in the account sufficient to pay for the order.

"(2 ter) If the originator has paid interest to the beneficiary on account of a delay in the completion of the credit transfer, the originator may recover such amount, to the extent that the beneficiary would have been entitled to but did not receive interest in accordance with paragraphs (1) and (2), from the originator's bank or the bank liable under paragraph (1). The originator's bank and each subsequent receiving bank that is not the bank liable under paragraph (1) may recover interest paid to its sender from its receiving bank or the bank liable under paragraph (1).

"(3) A receiving bank other than the beneficiary's bank that does not give a notice required under article 7(4) or (5) shall pay interest to the sender on any payment that it has received from the sender for the period during which it retains the payment.

"(4) A beneficiary's bank that does not give a notice required under article 9(2), (3) or (4) shall pay interest to the sender on any payment that it has received from the sender, from the day of payment until the day that it provides the required notice.

"Article 16 bis. Nature of remedies

"The remedies provided in this law do not depend on the existence of a pre-existing relationship between the parties, whether contractual or otherwise."

279. Due to a lack of time, the Commission did not discuss article 16 and decided to resume consideration of the draft article and of the above proposal at the next session.

Article 17

280. The text of draft article 17 as considered by the Commission was as follows:

"Article 17. Completion of credit transfer and discharge of obligation

"(1) A credit transfer is completed when the beneficiary's bank accepts the payment order. When the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it.

"(2) If the transfer was for the purpose of discharging an obligation of the originator to the beneficiary that can be discharged by credit transfer to the account indicated by the originator, the obligation is discharged when the beneficiary's bank accepts the payment order and to the extent that it would be discharged by payment of the same amount in cash.

"(3) A credit transfer shall be considered complete notwithstanding that the amount of the payment order accepted by the beneficiary's bank is less than the amount of the originator's payment order because one or more receiving banks have deducted charges. The completion of the credit transfer shall not prejudice any right of the beneficiary under the applicable law to recover the amount of those charges from the originator."

Paragraph (1)

281. A concern was expressed that the notion of "completion" of a credit transfer left room for confusion with the question of discharge of the underlying payment obligation. In response to that concern, it was stated that the purpose of paragraph (1) was merely to establish the moment of completion of a credit transfer and that the question of the discharge of the underlying payment, to the extent it was addressed in the Model Law, was referred to in paragraph (2).

282. It was suggested that the first sentence needed to be modified to make clear that a credit transfer was to be considered completed only if the acceptance of the payment order by the beneficiary's bank was for the benefit of the beneficiary designated in the originator's payment order. In the discussion of that proposal it was suggested that such a modification of the first sentence had to be considered in the light of a number of other provisions in the Model Law. In particular, it was pointed out that article 9(1) obligated the beneficiary's bank to place funds at the disposal of the beneficiary named in the payment order received by the beneficiary's bank. At the same time, it was also noted that, under article 2(d), the term "beneficiary" was defined as referring to the person designated in the originator's payment order to receive funds as a result of the credit transfer. It was further suggested that the proposed revision might have implications for the concept of acceptance of a payment order by the beneficiary's bank as set forth in article 8(1), particularly with regard to paragraphs (1)(a), (b) and (c), which referred to various situations in which a payment order would be deemed accepted by the beneficiary's bank prior to any crediting of a beneficiary's account. Yet another question was whether the proposed revision would have any implications for the situation in which the beneficiary failed to detect a discrepancy in a payment order between the name and account number of a beneficiary.

283. It was also suggested that the first sentence, in addition to being modified so as to indicate that the credit transfer was to be deemed completed only upon acceptance for the benefit of the beneficiary designated in the originator's payment order, should indicate that the payment order accepted by the beneficiary's bank had to be consistent with the originator's payment order in terms of amount. It was suggested that such an approach might be implemented by providing that the credit transfer would be considered completed to the extent that the amount indicated in the originator's payment order had been placed at the disposal of the beneficiary.

284. The Commission recalled that a specific rule as to when the credit transfer was completed was originally introduced into the Model Law in the definition of "credit transfer" in article 2(a). The view was expressed that some of the difficulties that had been raised with regard to the first

sentence of paragraph (1) might be alleviated if the rule on completion were returned to its original location in article 2(a) or, alternatively, if a reference to article 2(a) were added to paragraph (1).

285. A view was expressed that the second sentence was unnecessary and should therefore be deleted.

286. Due to a lack of time, the Commission suspended its discussion of article 17 and decided to resume consideration of the draft article at the next session.

Payment orders for illicit purposes

287. During the discussion of the Model Law, various statements were made to the effect that in drafting its provisions the Commission should be mindful of the problem of "money-laundering", i.e. transactions the purpose of which was to conceal or diguise the illicit nature and source of funds derived from illegal activities such as illicit traffic in narcotic drugs. Key stages of money-laundering operations often included transfers of funds through banks. Those stages were, in particular, when cash entered into the domestic financial system, when it was sent abroad to be integrated into the financial systems of regulatory havens, and when it was repatriated in the form of transfers of legitimate appearance.

288. It was pointed out that a number of States had rules aimed at preventing money laundering and that such rules were also contained in several international instruments. Those rules addressed issues such as responsibilities of banks and of supervisory authorities with respect to detection of suspicious transactions, keeping records of transactions, and identification of bank customers. It was said that the Model Law, with its aim to facilitate, speed up and reduce the cost of international payments, should be in harmony with rules designed to prevent money laundering.

C. Report of Drafting Group

289. The text of articles 1 to 15 discussed by the Commission was referred to the Drafting Group. The text of those articles as revised by the Drafting Group, as well as the text of articles 16 to 18 as they were submitted by the Working Group to the Commission, is contained in annex I.

D. Future work on draft Model Law on International Credit Transfers

290. The Commission noted that it had not completed its consideration of the draft Model Law and decided to place the draft Model Law on the agenda of the next session.

III. PROCUREMENT

291. At its nineteenth session, in 1986, the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted that work to the Working Group on the New International Economic Order. 4/ The Working Group commenced its work on the topic at its tenth session, held at Vienna from 17 to 25 October 1988 (A/CN.9/315), by considering a study of procurement prepared by the Secretariat. The Working Group requested the Secretariat to prepare a first draft of a model law on procurement and an accompanying commentary taking into account the discussions and decisions at the session (A/CN.9/315, para. 125).

292. At its eleventh session, held in New York from 5 to 16 February 1990, the Working Group considered the draft of a model law on procurement (A/CN.9/331) and, at the close of that session, requested the Secretariat to prepare for the twelfth session a revised draft of the model law based on the discussions during its eleventh session. The Working Group also requested the Secretariat to prepare draft provisions dealing with redress for actions and decisions taken by the procuring entity contrary to the provisions of the model law (A/CN.9/331, para. 222).

293. At its current session, the Commission had before it the report of the Working Group on the work of its twelfth session, held in Vienna from 8 to 19 October 1990 (A/CN.9/343). The report indicated that the Working Group had continued its consideration of the draft model law. At the close of the twelfth session the Working Group requested the Secretariat to revise articles 1 through 27 of the model law to take into account the discussions concerning those articles at the twelfth session and decided that at the thirteenth session it would resume consideration of the draft model law by taking up articles 28 to 35, as well as the draft provisions on redress.

294. Noting that the preparation of a model law on procurement was particularly timely in view of the fact that an increasing number of States were considering reform of their procurement laws, the Commission expressed appreciation for the work performed by the Working Group so far and requested it to proceed with its work expeditiously.

IV. GUARANTEES AND STAND-BY LETTERS OF CREDIT

295. The Commission, at its twenty-second session, held in 1989, decided that work on a uniform law on guarantees and stand-by letters of credit should be undertaken and entrusted that task to the Working Group on International Contract Practices. 5/

296. At its twenty-third session (1990), the Commission noted that the Working Group had commenced its work by considering possible issues of a uniform law as discussed in a note by the Secretariat (A/CN.9/WG.II/WP.65). Those issues related to the substantive scope of the uniform law, party autonomy and its limits, and possible rules of interpretation. The Commission also noted that the Working Group had engaged in a preliminary exchange of views on issues relating to the form and time of establishment of the guarantee or stand-by letter of credit. 6/

297. At its current session, the Commission had before it the reports of the Working Group on the work of its fourteenth and fifteenth sessions (A/CN.9/342 and A/CN.9/345). The Commission noted that the Working Group had examined draft articles 1 to 7 of the uniform law prepared by the Secretariat (A/CN.9/WG.II/WP.67) and that the Working Group had also considered the issues discussed in three notes by the Secretariat relating to further issues of a uniform law: amendment, transfer, expiry, and obligations of guarantor (A/CN.9/WG.II/WP.68); fraud and other objections to payment, injunctions and other court measures (A/CN.9/WG.II/WP.70); conflict of laws and jurisdiction (A/CN.9/WG.II/WP.71).

298. The Commission noted that the Working Group had requested the Secretariat to prepare, on the basis of the deliberations and conclusions of the Working Group, a revised draft of articles 1 to 7 of the uniform law, as well as a first draft set of articles with possible variants on the other issues considered. The Commission further noted that, when discussing the appropriateness of including provisions on conflicts of law and jurisdiction in the uniform law, the Working Group had requested the Secretariat to consult with the Hague Conference on Private International Law on possible methods of cooperation in that field.

299. The Commission expressed its appreciation for the progress made by the Working Group so far and requested it to continue carrying out its task expeditiously.

V. INTERNATIONAL COUNTERTRADE

300. At its nineteenth session, in 1986, the Commission considered, in the context of its discussion of a note by the Secretariat entitled "Future work in the area of the new international economic order" (A/CN.9/277), its future work on the topic of countertrade and requested the Secretariat to prepare a preliminary study on the subject. 7/

301. At its twenty-first session, in 1988, the Commission had before it a report entitled "Preliminary study of legal issues in international countertrade" (A/CN.9/302). The Commission made a preliminary decision that it would be desirable to prepare a legal guide on drawing up countertrade contracts. In order for it to make a final decision, the Commission requested the Secretariat to prepare for the Commission at its twenty-second session a draft outline of such a legal guide. 8/

302. At its twenty-second session, in 1989, the Commission considered the report entitled "Draft outline of the possible content and structure of a legal guide on drawing up international countertrade contracts" (A/CN.9/322). It was decided that such a legal guide should be prepared by the Commission, and the Secretariat was requested to prepare for the next session of the Commission draft chapters of the legal guide. 9/

303. At its twenty-third session, in 1990, the Commission had before it a report entitled "Draft legal guide on drawing up contracts in international countertrade transactions: sample chapters" (A/CN.9/332 and Add.1-7). The report contained a proposed structure of the legal guide (A/CN.9/332, para. 6), an outline of the chapter entitled "Introduction to legal guide" (A/CN.9/332/Add.1), and the following draft chapters: "II. Scope and terminology of legal guide" (A/CN.9/332/Add.1); "III. Contracting approach" (A/CN.9/332/Add.2); "IV. General remarks on drafting" (A/CN.9/332/Add.3); "V. Type, quality and quantity of goods" (A/CN.9/332/Add.4); "VI. Pricing of goods" (A/CN.9/332/Add.5); "IX. Payment" (A/CN.9/332/Add.6); and "XII. Security for performance" (A/CN.9/332/Add.7). Draft chapter VII, "Fulfilment of countertrade commitment" (A/CN.9/332/Add.8), was submitted to but not considered by the Commission. There was general agreement in the Commission with the overall approach taken in preparing the draft chapters, both as to the structure of the legal guide and as to the nature of the description and advice contained therein. The Commission decided that the remaining draft chapters should be discussed by the Working Group on International Payments at its twenty-fifth session, to be held in New York from 3 to 13 September 1991. 10/

304. At the current session, the Secretariat reported orally to the Commission that, in addition to draft chapter VII, "Fulfilment of countertrade commitment" (A/CN.9/332/Add.8), the following materials would be before the Working Group on International Payments at its forthcoming session in New York: document A/CN.9/WG.IV/WP.51, setting out, in paragraph 9, the revised proposed structure of the legal guide, and containing in its addenda the following draft chapters: "VIII. Participation of third parties" (A/CN.9/WG.IV/WP.51/Add.1); "X. Restrictions on resale of goods" (A/CN.9/WG.IV/WP.51/Add.2); "XI. Liquidated damages and penalty clauses" (A/CN.9/WG.IV/WP.51/Add.3); "XIII. Failure to complete countertrade

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VI. LEGAL PROBLEMS OF ELECTRONIC DATA INTERCHANGE

306. The Commission, at its seventeenth session, in 1984, decided to place the subject of the legal implications of automatic data processing for the flow of international trade on its programme of work as a priority item. 11/ It did so after considering a report of the Secretary-General entitled "Legal aspects of automatic data processing" (A/CN.9/254), which identified several legal issues, relating, namely, to the legal value of computer records, the requirement of a writing, authentication, general conditions and bills of lading.

307. At its eighteenth session, in 1985, the Commission had before it a report by the Secretariat entitled "Legal value of computer records" (A/CN.9/265). The report came to the conclusion that, on a global level, there were fewer problems in the use of data stored in computers as evidence in litigation than might have been expected. It noted that a more serious legal obstacle to the use of computers and computer-to-computer telecommunications in international trade arose out of requirements that documents had to be signed or be in paper form. At that session, the Commission recommended to Governments, inter alia, that they should eliminate unnecessary obstacles to the use of computers in trade, and recommended to international organizations elaborating legal texts related to trade that they take account of the need to eliminate unnecessary obstacles to the use of computers in trade. 12/ That recommendation was endorsed by the General Assembly in its resolution 40/71 of 11 December 1985. 13/

308. At its nineteenth and twentieth sessions, in 1986 and 1987, the Commission had before it two further reports on the legal aspects of automatic data processing (A/CN.9/279 and A/CN.9/292), which described and analysed the work of international organizations active in the field of automatic data processing.

309. At its twenty-first session, in 1988, the Commission considered a proposal to examine the need to provide for the legal principles that would apply to the formation of international commercial contracts by electronic means. It was noted that there currently existed no refined legal structure for the important and rapidly growing field of formation of contracts by electronic means and that future work in that area could help to fill a legal vacuum and to reduce uncertainties and difficulties encountered in practice. The Commission requested the Secretariat to prepare a preliminary study on the topic. 14/

310. At its twenty-third session (1990), the Commission had before it a report entitled "Preliminary study of legal issues related to the formation of contracts by electronic means" (A/CN.9/333). The report summarized work that had been undertaken in the European Communities and in the United States of America on the requirement of a writing as well as other issues that had been identified as arising in the formation of contracts by electronic means. The efforts to overcome some of those problems by the use of model communication agreements were also discussed. The report suggested that the Secretariat might be requested to submit a further report to the twenty-fourth session of the Commission indicating developments in other organizations relevant to the legal issues arising in electronic data interchange (EDI). The Commission

requested the Secretariat to continue its examination of the legal issues related to the formation of contracts by electronic means and to prepare for the Commission at its twenty-fourth session a report that would analyse existing and proposed model communication agreements with a view to recommending whether a model agreement should be available for world-wide use and, if so, whether the Commission should undertake its preparation. The Commission expressed the wish that the report would give it the basis on which to decide what work might be undertaken by the Commission in the field. 15/

311. At the current session, the Commission had before it the report it had requested, entitled "Electronic Data Interchange" (A/CN.9/350). The report described the current activities in the various organizations involved in the legal issues of EDI and analysed the contents of a number of standard interchange agreements already developed or being currently developed. It also pointed out that such documents varied considerably according to the various needs of the different categories of users they were intended to serve and that the variety of contractual arrangements had sometimes been described as hindering the development of a satisfactory legal framework for the business use of EDI. It suggested that there was a need for a general framework that would identify the issues and provide a set of legal principles and basic legal rules governing communication through EDI. It concluded that such a basic framework could, to a certain extent, be created by contractual arrangements between parties to an EDI relationship and that the existing contractual frameworks that were proposed to the community of EDI users were often incomplete, mutually incompatible, and inappropriate for international use since they relied to a large extent upon the structures of local law.

312. The report noted that, although many efforts were currently being undertaken by different technical bodies, standardization institutions and international organizations with a view to clarifying the issues of EDI, none of the organizations that were primarily concerned with world-wide unification and harmonization of legal rules had, as yet, started working on the subject of a communications agreement. With a view to achieving the harmonization of basic EDI rules for the promotion of EDI in international trade, the report suggested that the Commission might wish to consider the desirability of preparing a standard communications agreement for use in international trade. It pointed out that work by the Commission in that field would be of particular importance since it would involve participation of all legal systems, including those of developing countries that were already or would soon be confronted with the issues of EDI.

313. The report also suggested that possible future work for the Commission on the legal issues of EDI might concern the subject of the replacement of negotiable documents of title, and more particularly transport documents, by EDI messages. That was the area where the need for statutory provisions seemed to be developing most urgently with the increased use of EDI. The report suggested that the Secretariat might be requested to submit a report to a further session of the Commission on the desirability and feasibility of preparing such a text.

314. The Commission expressed its appreciation for the report submitted to it. It was agreed that the legal issues of EDI would become increasingly important as the use of EDI developed and that the Commission should undertake work in that field.

315. As regards the suggestions reflected above, there was wide support for the suggestion that the Commission should undertake the preparation of a general framework identifying the legal issues and providing a set of legal principles and basic legal rules governing communication through EDI. The Commission was agreed that, given the number of issues involved, the matter needed detailed consideration by a Working Group.

316. As regards the preparation of a standard communication agreement for world-wide use in international trade, support was given to the idea that such a project might be appropriate for the Commission. However, divergent views were expressed as to whether the preparation of such a standard communications agreement should be undertaken as a priority item. Under one view, work on a standard agreement should be undertaken immediately for the reasons expressed in the report, namely that no such document existed or seemed to be prepared by any of the organizations that were primarily concerned with world-wide unification and harmonization of legal rules and that the Commission would be a particularly good forum since it involved participation of all legal systems, including those of developing countries that were already or would soon be confronted with the issues of EDI. The prevailing view, however, was that it was premature to engage immediately in the preparation of a standard communications agreement and that it might be preferable, until the next session of the Commission, to monitor developments in other organizations, particularly the Commission of the European Communities and the Economic Commission for Europe. It was pointed out that high-speed electronic commerce required a new examination of basic contract issues such as offer and acceptance, and that consideration should be given to legal implications of the role of central data managers in international commercial law.

317. After deliberation, the Commission decided that a session of the Working Group on International Payments would be devoted to identifying the legal issues involved and to considering possible statutory provisions, and that the Working Group would report to the Commission at its next session on the desirability and feasibility of undertaking further work such as the preparation of a standard communications agreement. The Commission also took note of the suggestion by the Secretariat to prepare a uniform law on the replacement of negotiable documents of title, and more particularly transport documents, by EDI messages.

VII. COORDINATION OF WORK

318. The Commission had before it a note by the Secretariat on current activities of international organizations related to the harmonization and unification of international trade law (A/CN.9/352). The note reported on the progress of the Secretariat's efforts to collect information on the extent to which multilateral and bilateral development organizations might be involved in activities whose objective was that of modernizing commercial law in developing countries. It was the understanding of the Secretariat that various multilateral and bilateral development agencies had aided developing countries to prepare legislation in various aspects of commercial law including such matters as maritime law, commercial arbitration, and intellectual property. It was the understanding of the Secretariat that projects of that nature had been undertaken at the request of both individual Governments and groups of Governments. It was thought that it would, therefore, be of great value to have a global picture of those activities. The note reported that while a number of organizations that had been solicited for information replied to the Secretariat, the information received was disappointing. The Secretariat proposed to continue the investigations and to report its findings to the Commission at its twenty-fifth session.

319. The Commission noted with appreciation the efforts of the Secretariat to obtain information on the extent to which multilateral and bilateral development organizations might be involved in activities relating to the modernization of commercial law in developing countries.

VIII. STATUS OF CONVENTIONS

320. The Commission considered the state of signatures, ratifications, accessions and approvals of conventions that were the outcome of its work, that is, the Convention on the Limitation Period in the International Sale of Goods ("the Limitation Convention"), the Protocol amending the Limitation Convention, the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) ("the Hamburg Rules"), the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("the United Nations Sales Convention"), the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988) and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991). The Commission also considered the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). In addition, the Commission took note of the jurisdictions that had enacted legislation based on the UNCITRAL Model Law on International Commercial Arbitration. The Commission had before it a note by the Secretariat on the status of those Conventions and of the Model Law as at 5 June 1991 (A/CN.9/353).

321. The Commission was pleased to note that, since the report submitted to the Commission at its twenty-third session, in 1990, Guinea had ratified the Limitation Convention and its amending Protocol. As a result of those actions eight States were now parties to the Limitation Convention as amended by the Protocol, while four States were parties to the unamended Convention.

322. The Commission took pleasure in noting that an additional two States, namely, Guinea and Malawi, had acceded to the Hamburg Rules, bringing the total number of parties to 19. The Secretary of the Commission reaffirmed the expectation of the Secretariat that the one additional ratification or accession necessary for the Convention to come into force would be deposited in the near future.

323. With respect to the United Nations Sales Convention, the Commission noted with satisfaction that the following seven additional States had become parties to the Convention: Bulgaria, Canada, Guinea, Netherlands, Romania, Spain, and Union of Soviet Socialist Republics.

324. The Commission noted with pleasure the accessions by Côte d'Ivoire and Guinea to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

325. The Commission noted with pleasure that Guinea had acceded to the United Nations Convention on International Bills of Exchange and International Promissory Notes.

326. The Commission noted with pleasure that Mexico, Philippines and Spain had signed the United Nations Convention on Liability of Operators of Transport Terminals in International Trade on 19 April 1991, at the close of the diplomatic conference at which the Convention had been adopted.

327. With respect to the UNCITRAL Model Law on International Commercial Arbitration, the Commission noted with pleasure that legislation based on the Model Law had been enacted in Scotland.

328. Representatives and observers of a number of States reported that official action was being taken with a view to adherence to the United Nations Sales Convention and to adoption of legislation based on the UNCITRAL Model Law on International Commercial Arbitration.

IX. TRAINING AND ASSISTANCE

329. The Commission had before it a note by the Secretariat that set out the activities that had been carried out in respect of training and assistance during the prior year as well as possible future activities in that field (A/CN.9/351). The note indicated that since the statement of the Commission at its twentieth session, in 1987, "that training and assistance was an important activity of the Commission and should be given a higher priority than it had in the past", 16/ the Secretariat had endeavoured to devise a more extensive programme of training and assistance than had been previously carried out. In doing so the Secretariat had kept in mind the decision of the Commission at its fourteenth session, in 1981, that a major purpose of the training and assistance activities should be the promotion of the texts that had been prepared by the Commission. 17/

330. A series of seminars was organized by the Comisión Centroamericana de Transporte Marítimo (COCATRAM) in the member States of COCATRAM (Costa Rica, Guatemala, El Salvador, Honduras and Nicaragua) on the United Nations Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules). The seminars were co-sponsored by the Commission's Secretariat. Lectures were given by a professor from Chile and a member of the Secretariat.

331. At the seminars held in Costa Rica and Honduras, the participants requested the organization of a meeting of experts from the five Central American republics so that they might consider together the action that might be taken in regard to the Hamburg Rules. COCATRAM organized the meeting in Puerto Cortés, Honduras, on 18 and 19 March 1991. Fourteen experts from Costa Rica, El Salvador, Guatemala and Nicaragua attended the meeting in addition to approximately twenty participants from Honduras. A member of the Commission's Secretariat also participated. At the close of the meeting the participants adopted a "Declaration of Puerto Cortés" in which it was stated that it was necessary for the Central American countries to exert a strong effort to bring the Hamburg Rules into force by their ratification, adhesion and incorporation into their internal legal orders. The Declaration also called on COCATRAM to bring the Declaration to the attention of the next Meeting of Central American Ministers responsible for transport and to request their support for the ratification of the Convention by the five Central American States in the shortest time possible.

332. As announced to the twenty-third session of the Commission (1990), 18/ a regional seminar on international trade law was held at Douala, Cameroon, from 14 to 18 January 1991. The seminar was organized for the francophone States of North and West Africa with the collaboration of the Government of Cameroon. The seminar was organized with the financial assistance of the Governments of Canada, France and Luxembourg. It was open to participants from Algeria, Benin, Burkina Faso, Cameroon, the Central African Republic, Chad, the Congo, Gabon, Guinea, Mali, Mauritania, Morocco, the Niger, Senegal, Togo, Tunisia and Zaire. Approximately 50 participants attended the seminar, plus a number of observers from Cameroon. Participants were principally from the Ministry of Foreign Affairs, Ministry of Justice, Ministry of Trade, Chamber of Commerce and Industry and the University. The seminar, which was conducted in French, considered the conventions and other legal texts prepared by the Commission. Lectures were given by one current and one former

representative to the Commission and by two members of the Secretariat. Representatives who had given lectures to the seminar expressed their satisfaction with it.

333. A subregional seminar on international trade law was held at Quito, Ecuador, from 19 to 21 February 1991. The seminar was organized by the Andean Pact (Colombia, Ecuador, Bolivia, Peru and Venezuela) and the Andean Federation of Users of Transport Services and co-sponsored by the UNCITRAL Secretariat. While the seminar covered the full range of activities of the Commission, the work of UNCITRAL in the area of international transport law was the topic of greatest interest to the seminar. One of the purposes of the seminar was to inform the private sector in the Andean region of the importance of the Hamburg Rules and the United Nations Convention on the Multimodal Carriage of Goods prepared by UNCTAD. As a result, there was a large representation of participants from the private sector. Lectures were given in Spanish by one representative to the Commission, one professor who had spent an internship with the Secretariat in 1985 and a member of the Secretariat.

334. As had been reported to the Commission at its twenty-third session, in 1990, a symposium on the work of the Commission was held during the second week of the Commission's session, from 17 to 21 June 1991. Approximately 168 applications for the Symposium were received from 86 countries. Funds were available to award 30 scholarships to cover the travel expenses of participants from developing countries. An additional 38 individuals participated without financial support from UNCITRAL. Lectures on the conventions and other legal texts prepared by the Commission were given by representatives and observers who had participated in the preparation of the texts and by members of the Secretariat.

335. The Secretariat reported that the participants had expressed their appreciation of the opportunity to learn more about the work of the Commission. Participants, particularly from developing countries, had emphasized that the Commission's programme on training and assistance was an important vehicle through which to spread knowledge and expertise in international trade law and to promote the adoption and use of the texts prepared by the Commission. Representatives and observers at the session who had given lectures to the Symposium expressed their satisfaction with the interest shown by the participants and with the high quality of the discussion at the Symposium.

336. The Commission expressed its appreciation to Austria, Canada, Denmark and Finland for their contributions to the financing of the Symposium, and to Switzerland, whose general contribution had also been used for that purpose. The Commission also expressed its appreciation to those who had given lectures at the Symposium, as well as to those who had organized it. A suggestion was made that announcements concerning the holding of UNCITRAL Symposia should be more widely disseminated so as to reach a wider audience worldwide.

337. The Commission was informed that the Secretariat expected to intensify even further its efforts to organize or co-sponsor seminars and symposia on international trade law, especially for developing countries. In view of the interest in the Symposium held during the current session and of the advantages of holding symposia in connection with the sessions of the

Commission when they were held at the location of the Commission's Secretariat at Vienna, it was intended to organize a symposium on the occasion of the twenty-sixth session of the Commission, in 1993.

338. As announced to the twenty-third session of the Commission (1990), 18/ a seminar will be organized in cooperation with the South Pacific Forum at Suva, Fiji. The seminar is planned for 21 to 25 October 1991. The seminar is being coordinated with the annual Australian Trade Law Seminar, which will be held this year on 18 and 19 October 1991, and is being organized with the financial assistance of the Australian Government.

339. The Secretariat plans to increase the programme of specific country seminars. It was recalled that a seminar was held at Conakry, Guinea, from 27 to 29 March 1990, for participants from Guinea. It was noted that on 23 January 1991 Guinea deposited its instrument of accession to five conventions that had been the subject of the seminar, i.e., the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958); the Convention on the Limitation Period in the International Sale of Goods (New York, 1974) and its 1980 amending Protocol; the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) and the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988). The Secretariat was of the view that country seminars were relatively cost-effective from a financial point of view, since the only expense was normally the travel cost of lecturers. However, country seminars required a significantly greater expenditure of time for each country where a seminar was held than did regional seminars. Therefore, an appropriate balance between regional seminars and country seminars would depend to some degree on the balance between the financial resources available to the Secretariat and the amount of time that could be devoted to the organization and holding of such seminars.

340. It was suggested that the Secretariat might consider the possibilities of cooperating in the holding of seminars and symposia with other international organizations working in the field of harmonization and unification of law such as the United Nations Institute for the Unification of Private Law (UNIDROIT) and the Hague Conference on Private International Law.

341. The Commission expressed its appreciation to all those who had participated in the organization of UNCITRAL symposia and seminars and in particular to those States that had given financial assistance to the programme of seminars and symposia. The Commission also expressed its appreciation to the Secretariat for its efforts to conduct an increased programme of seminars and symposia.

X. RELEVANT GENERAL ASSEMBLY RESOLUTIONS AND OTHER BUSINESS

A. General Assembly resolution on the work of the Commission

342. The Commission took note with appreciation of General Assembly resolution 45/42 of 29 January 1991 on the report of the United Nations Commission on International Trade Law on the work of its twenty-third session. In particular, the Commission noted the decision of the General Assembly expressed in that resolution requesting the Secretary-General, in consultation with the Commission's Secretariat, to prepare a report to be submitted to the General Assembly at its forty-sixth session analysing possible ways by which assistance could be given to developing countries that were members of the Commission, in particular to the least developed countries, so that they could attend meetings of the Commission and its working groups.

B. Decade of International Law

343. The General Assembly, by its resolution 44/23 of 17 November 1989, declared the period 1990 to 1999 as the United Nations Decade of International Law. During its forty-fifth session, the General Assembly adopted, in its resolution 45/40 of 28 November 1990, the "Programme for the activities to be commenced during the first term (1990-1992) of the United Nations Decade of International Law".

344. The Commission, at its twenty-third session in 1990, engaged in a preliminary discussion of implications of the Decade for its future work. While various suggestions were made how the Commission could contribute to the Decade, no firm conclusions were reached at that session. 19/

345. At the current session, the Commission had before it a note by the Secretariat (A/CN.9/349) on the matter. The note, in recapitulating the actions that the Commission and the General Assembly had taken so far on the Decade, pointed out that the initiative for implementation of the Programme would rest in large measure with the various international organs and organizations interested in international law. As a result, it was suggested in the note that the Commission might wish to respond to the invitation of the General Assembly contained in resolution 45/40 by preparing a programme of activities for the Decade that was specifically related to international trade law. The note proposed that, as a first step in the preparation of such a programme, the Commission might organize a Congress on International Trade Law to be held in the context of the twenty-fifth session of the Commission in 1992.

346. The Commission welcomed the proposal that it would be useful to organize a Congress on International Trade Law and that the Congress should be organized in the context of the twenty-fifth session of the Commission in 1992, to be held in New York in May 1992 (see below, para. 354). The Commission agreed that one week of the session should be devoted to the Congress. The Commission considered that speakers at the Congress should be from all the major legal systems and geographical regions of the world and should include both individuals currently or formerly associated with the Commission and individuals not associated with the Commission but who had particular expertise.

347. Since the Congress would be an integral part of the twenty-fifth session of the Commission, all States and all interested international organizations would automatically be invited to attend. The Commission expressed the hope that all States and concerned international organizations would take the opportunity to send delegates to the Congress to consider the accomplishments achieved in the progressive unification and harmonization of international trade law during the past 25 years and the needs that could be foreseen for the next 25 years. The Commission was agreed that the programme of the Congress should be such that specialists in international trade law who were not associated with a delegation would be interested in attending. It was considered desirable to attract the interest of ultimate users of uniform legal texts, such as practising lawyers, corporate counsel, ministry officials, judges and teachers of law.

348. Various suggestions were made concerning the objectives and orientation of the Congress. There was general agreement that the Congress should be practically oriented. In particular, it should provide an opportunity to ultimate users of legal texts relating to international trade to express their opinion on the current state in selected areas of international trade law and to voice their practical needs. As examples of the areas that might be discussed, the following were mentioned: sale of goods, supply of services, transport by sea and other modes of transport, international payments, and electronic data interchange. Views of practitioners should be an integral part of the discussions at the Congress on the future programme of work of the Commission. The Congress should also provide to practitioners information and guidance concerning the principal legal texts offered to them. Suggestions were made that among the questions to be discussed at the Congress the following should be included: the merits of various techniques for the unification and harmonization of rules on international trade; methods of work of the Commission and its subsidiary bodies; promotion of the adoption and use of existing legal texts; application of texts relating to international trade law in national legal systems; harmonization between the universal and the regional codification of international trade law; and methods of improved coordination of the activities of international organizations active in the field of unifications of law.

349. The Commission entrusted its Secretariat with the organization of the Congress and requested it to prepare, by the autumn of 1991, an outline of the programme of the Congress. Note was taken of a request that any suggestions and observations that Governments and international organizations may wish to make concerning the preparations of the Congress should be given to the Secretariat not later than mid-September 1991.

C. INCOTERMS 1990

350. The Commission was notified of a request from the Acting Secretary-General of the International Chamber of Commerce (ICC) that the Commission consider endorsing INCOTERMS 1990 for world-wide use. In order to allow consideration of that request, the Commission had before it the text of INCOTERMS 1990 (document A/CN.9/348).

351. It was recalled that the Commission, at its second session in 1969, had endorsed INCOTERMS 1953. Reference was made to the importance of INCOTERMS as

a widely used practical tool and to the need for wider awareness of INCOTERMS. Furthermore, appreciation was expressed for the efforts made by ICC to revise INCOTERMS in order to stay abreast of changes in transportation techniques and trade documentation.

352. However, while several delegations indicated their desire to endorse the text of INCOTERMS at the present session, some delegations indicated that, owing to the fact that late publication of document A/CN.9/348 had prevented them from carrying out the consultations required prior to endorsement, they were not prepared to endorse the text of INCOTERMS at that session. The Commission regretfully felt obliged to postpone consideration of endorsement until the next session.

D. Bibliography

353. The Commission noted with appreciation the bibliography of recent writings related to the work of the Commission (A/CN.9/354).

E. Date and place of the twenty-fifth session of the Commission

354. It was decided that the Commission would hold its twenty-fifth session from 4 to 22 May 1992 in New York. 20/ It was further decided that the Congress on International Trade Law (see para. 349, above) would take place during the last week of that session (i.e. 18 to 22 May 1992).

F. Sessions of the working groups

355. The Commission recalled its decision that the Working Group on International Contract Practices would hold its sixteenth session from 4 to 15 November 1991 at Vienna, and agreed that the Working Group would hold its seventeenth session from 6 to 16 April 1992 in New York.

356. The Commission recalled its decision that the Working Group on the New International Economic Order would hold its thirteenth session from 15 to 26 July 1991 in New York and its fourteenth session from 2 to 13 December 1991 at Vienna, and agreed that the Working Group would hold its fifteenth session from 3 to 14 August 1992 in New York.

357. The Commission noted that the Working Group on International Payments would hold its twenty-third session from 3 to 13 September 1991 in New York to consider draft chapters of the legal guide on drawing up contracts in international countertrade transactions and decided that the Working Group would hold its twenty-fourth session from 27 January to 7 February 1992 at Vienna to take up its work on electronic data interchange.

G. Retirement of Secretary of Commission

358. It was noted that the current session was the last one at which Mr. Eric E. Bergsten was serving as Secretary of the Commission. The Commission expressed its appreciation to Mr. Bergsten, who was due to retire

from the Secretariat, for the contribution he had made to the accomplishments of the Commission during his years of service to the Commission both as a member of the Secretariat and as Secretary.

Notes

1/ Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 19 were elected by the Assembly at its fortieth session on 10 December 1985 (decision 40/313) and 17 were elected by the Assembly at its forty-third session on 19 October 1988 (decision 43/307). Pursuant to resolution 31/99 of 15 December 1976, the term of those members elected by the Assembly at its fortieth session will expire on the last day prior to the opening of the twenty-fifth regular annual session of the Commission, in 1992, while the term of those members elected at its forty-third session will expire on the last day prior to the opening of the twenty-eighth regular annual session of the Commission, in 1995.

2/ The elections took place at the 439th, 446th, 450th and 453rd meetings, on 10, 13, 17 and 19 June. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that, together with the Chairman and the Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), sect. II, para. 1, will be represented on the bureau of the Commission (see the report of the United Nations Commission on International Trade Law on the work of its first session, *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16* (A/7216), para. 14 (*Yearbook of the United Nations Commission on International Trade Law, vol. I: 1968-1970* (United Nations publication, Sales No. E.71.V.1), part two, I, A, para. 14).

3/ *Official Records of the General Assembly, Forty-first Session, Supplement No. 17* (A/41/17), para. 230.

4/ Ibid., para. 243.

5/ Ibid., *Forty-fourth Session, Supplement No. 17* (A/44/17), para. 244.

6/ Ibid., *Forty-fifth Session, Supplement No. 17* (A/45/17), para. 31.

7/ Ibid., *Forty-first Session, Supplement No. 17* (A/41/17), para. 243.

8/ Ibid., *Forty-third Session, Supplement No. 17* (A/43/17), paras. 32-35.

9/ Ibid., *Forty-fourth Session, Supplement No. 17* (A/44/17), paras. 245-249.

10/ Ibid., *Forty-fifth Session, Supplement No. 17* (A/45/17), paras. 11-18. A summary of the discussion in the Commission on the draft chapters (A/CN.9/332/Add.1-7) is contained in annex I to A/45/17.

11/ Ibid., *Thirty-ninth Session, Supplement No. 17* (A/39/17), para. 136.

Notes (continued)

12/ Ibid., Fortieth Session, Supplement No. 17 (A/40/17), para. 360.

13/ Reprinted in Yearbook of the United Nations Commission on International Trade Law, 1985, vol. XVI, Part One, D. (United Nations publications, Sales No. E.87.V.4).

14/ Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), paras. 46 and 47, and ibid., Forty-fourth Session, Supplement No. 17 (A/44/17), para. 289.

15/ Ibid., Forty-fifth Session, Supplement No. 17 (A/45/17), paras. 38 to 40.

16/ Ibid., Forty-second Session, Supplement No. 17 (A/42/17), para. 335.

17/ Ibid., Thirty-sixth Session, Supplement No. 17 (A/36/17), para. 109.

18/ Ibid., Forty-fifth Session, Supplement No. 17 (A/45/17), para. 56.

19/ Ibid., para. 74.

20/ The dates originally agreed on, namely 11 to 29 May 1992, had to be changed for technical reasons.

ANNEX I

Draft UNCITRAL Model Law on International Credit Transfers

Part I. Text of articles 1 to 15 as they result from the work of the Commission at its twenty-fourth session

CHAPTER I. GENERAL PROVISIONS

Article 1

Sphere of application*

(1) This law applies to credit transfers where any sending bank and its receiving bank are in different States.

(2) This law applies to other entities that as an ordinary part of their business engage in executing payment orders in the same manner as it applies to banks.

(3) For the purpose of determining the sphere of application of this law, branches and separate offices of a bank in different States are separate banks.

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* This law does not deal with issues related to the protection of consumers.

Article 2

Definitions

For the purposes of this law:

(a) "Credit transfer" means one or more payment orders, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of a beneficiary. The term includes any payment order issued by the originator's bank or any intermediary bank intended to carry out the originator's payment order. A payment order issued for the purpose of effecting payment for such an order is considered to be part of a different credit transfer.

(b) "Payment order" means an unconditional instruction, in any form, by a sender to a receiving bank to place at the disposal of a beneficiary a fixed or determinable amount of money if:

(i) the receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender, and

(ii) the instruction does not provide that payment is to be made at the request of the beneficiary.

Nothing in this paragraph prevents an instruction from being a payment order merely because it directs the beneficiary's bank to hold, until the beneficiary requests payment, funds for a beneficiary that does not maintain an account with it.

(c) "Originator" means the issuer of the first payment order in a credit transfer.

(d) "Beneficiary" means the person designated in the originator's payment order to receive funds as a result of the credit transfer.

(e) "Sender" means the person who issues a payment order, including the originator and any sending bank.

(g) A "receiving bank" is a bank that receives a payment order.

(h) "Intermediary bank" means any receiving bank other than the originator's bank and the beneficiary's bank.

(i) "Funds" or "money" includes credit in an account kept by a bank and includes credit denominated in a monetary unit of account that is established by an intergovernmental institution or by agreement of two or more States, provided that this law shall apply without prejudice to the rules of the intergovernmental institution or the stipulations of the agreement.

(j) "Authentication" means a procedure established by agreement to determine whether a payment order or a revocation of a payment order was issued by the person indicated as the sender.

(k) "Execution period" means the period of one or two days beginning on the first day that a payment order may be executed under article 10(1) and ending on the last day on which it may be executed under that article, on the assumption that it is accepted on receipt.

[(l) "Execution", in so far as it applies to a receiving bank other than the beneficiary's bank, means the issue of a payment order intended to carry out the payment order received by the receiving bank.]

(n) "Interest" means the time value of the funds or money involved, which, unless otherwise agreed, is calculated at the rate and on the basis customarily accepted by the banking community for the funds or money involved.

Article 2 bis

Conditional instructions

(1) When an instruction is not a payment order because it is subject to a condition but a bank that has received the instruction executes it by issuing an unconditional payment order, thereafter the sender of the instruction has the same rights and obligations under this law as the sender of a payment order and the beneficiary designated in the instruction shall be treated as the beneficiary of a payment order.

(2) This law does not govern the time of execution of a conditional instruction received by a bank, nor does it affect any right or obligation of the sender of a conditional instruction that depends on whether the condition has been satisfied.

Article 3

Variation by agreement

Except as otherwise provided in this law, the rights and obligations of parties to a credit transfer may be varied by their agreement.

CHAPTER II. OBLIGATIONS OF THE PARTIES

Article 4

Obligations of sender

(1) A sender is bound by a payment order or a revocation of a payment order if it was issued by the sender or by another person who had the authority to bind the sender.

(2) When a payment order or a revocation of a payment order is subject to authentication other than by means of a mere comparison of signature, a purported sender who is not bound under paragraph (1) is nevertheless bound if:

- (a) the authentication is in the circumstances a commercially reasonable method of security against unauthorized payment orders, and

- (b) the receiving bank complied with the authentication.

(3) The parties are not permitted to agree that paragraph (2) shall apply if the authentication is not commercially reasonable in the circumstances.

(4) A purported sender is, however, not bound under paragraph (2) if it proves that the payment order as received by the receiving bank resulted from the actions of a person other than

- (a) a present or former employee of the purported sender, or

- (b) a person whose relationship with the purported sender enabled that person to gain access to the authentication procedure.

The preceding sentence does not apply if the receiving bank proves that the payment order resulted from the actions of a person who had gained access to the authentication procedure through the fault of the purported sender.

(5) A sender who is bound by a payment order is bound by the terms of the order as received by the receiving bank. However, the sender is not bound by an erroneous duplicate of, or an error in, a payment order if:

(a) the sender and the receiving bank have agreed upon a procedure for detecting erroneous duplicates or errors in a payment order, and

(b) use of the procedure by the receiving bank revealed or would have revealed the erroneous duplicate or the error.

If the error that the bank would have detected was that the sender instructed payment of an amount greater than the amount intended by the sender, the sender is bound only to the extent of the amount that was intended. This paragraph applies to an error in a revocation order as it applies to an error in a payment order.

(6) A sender becomes obligated to pay the receiving bank for the payment order when the receiving bank accepts it, but payment is not due until the beginning of the execution period.

Article 5

Payment to receiving bank

For the purposes of this law, payment of the sender's obligation under article 4(6) to pay the receiving bank occurs:

(a) if the receiving bank debits an account of the sender with the receiving bank, when the debit is made; or

(b) if the sender is a bank and subparagraph (a) does not apply,

(i) when a credit that the sender causes to be entered to an account of the receiving bank with the sender is used or, if not used, on the banking day following the day on which the credit is available for use and the receiving bank learns of that fact, or

(ii) when a credit that the sender causes to be entered to an account of the receiving bank in another bank is used or, if not used, on the banking day following the day on which the credit is available for use and the receiving bank learns of that fact, or

(iii) when final settlement is made in favour of the receiving bank at a central bank at which the receiving bank maintains an account, or

(iv) when final settlement is made in favour of the receiving bank in accordance with

a. the rules of a funds transfer system that provides for the settlement of obligations among participants either bilaterally or multilaterally, or

b. a bilateral netting agreement with the sender; or

(c) if neither subparagraph (a) nor (b) applies, as otherwise provided by law.

Article 6

Acceptance or rejection of a payment order by receiving bank other than the beneficiary's bank

(1) The provisions of this article apply to a receiving bank other than the beneficiary's bank.

(2) A receiving bank accepts the sender's payment order at the earliest of the following times:

(a) when the bank receives the payment order, provided that the sender and the bank have agreed that the bank will execute payment orders from the sender upon receipt,

(b) when the bank gives notice to the sender of acceptance,

(c) when the bank issues a payment order intended to carry out the payment order received,

(d) when the bank debits an account of the sender with the bank as payment for the payment order,

(e) when the time for giving notice of rejection under paragraph (3) has elapsed without notice having been given.

(3) A receiving bank that does not accept a payment order is required to give notice of rejection no later than on the banking day following the end of the execution period, unless:

(a) where payment is to be made by debiting an account of the sender with the receiving bank, there are insufficient funds available in the account to pay for the payment order;

(b) where payment is to be made by other means, payment has not been made; or

(c) there is insufficient information to identify the sender.

(4) A payment order ceases to have effect if it is neither accepted nor rejected under this article before the close of business on the fifth banking day following the end of the execution period.

Article 7

Obligations of receiving bank other than the beneficiary's bank

(1) The provisions of this article apply to a receiving bank other than the beneficiary's bank.

(2) A receiving bank that accepts a payment order is obligated under that payment order to issue a payment order, within the time required by article 10, either to the beneficiary's bank or to an intermediary bank, that

is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner.

(3) If a receiving bank determines that it is not feasible to follow an instruction of the sender specifying an intermediary bank or funds transfer system to be used in carrying out the credit transfer, or that following such an instruction would cause excessive costs or delay in completing the credit transfer, the receiving bank shall be taken to have complied with paragraph (2) if it inquires of the sender what further actions it should take in the light of the circumstances, before the end of the execution period.

(4) When an instruction is received that appears to be intended to be a payment order but does not contain sufficient data to be a payment order, or being a payment order it cannot be executed because of insufficient data, but the sender can be identified, the receiving bank shall give notice to the sender of the insufficiency, within the time required by article 10.

(5) When a receiving bank detects that there is an inconsistency in the information relating to the amount of money to be transferred, it shall, within the time required by article 10, give notice to the sender of the inconsistency, if the sender can be identified. Any interest payable under article 16(3) for failing to give the notice required by this paragraph shall be deducted from any interest payable under article 16(1) for failing to comply with paragraph (2).

(6) For the purposes of this article, branches and separate offices of a bank, even if located in the same State, are separate banks.

Article 8

Acceptance or rejection of a payment order by beneficiary's bank

(1) The beneficiary's bank accepts a payment order at the earliest of the following times:

(a) when the bank receives the payment order, provided that the sender and the bank have agreed that the bank will execute payment orders from the sender upon receipt,

(b) when the bank gives notice to the sender of acceptance,

(c) when the bank debits an account of the sender with the bank as payment for the payment order,

(d) when the bank credits the beneficiary's account or otherwise places the funds at the disposal of the beneficiary,

(e) when the bank gives notice to the beneficiary that it has the right to withdraw the funds or use the credit,

(f) when the bank otherwise applies the credit as instructed in the payment order,

(g) when the bank applies the credit to a debt of the beneficiary owed to it or applies it in conformity with an order of a court or other competent authority,

(h) when the time for giving notice of rejection under paragraph (2) has elapsed without notice having been given.

(2) A beneficiary's bank that does not accept a payment order is required to give notice of rejection no later than on the banking day following the end of the execution period, unless:

(a) where payment is to be made by debiting an account of the sender with the beneficiary's bank, there are insufficient funds available in the account to pay for the payment order;

(b) where payment is to be made by other means, payment has not been made; or

(c) there is insufficient information to identify the sender.

(3) A payment order ceases to have effect if it is neither accepted nor rejected under this article before the close of business on the fifth banking day following the end of the execution period.

Article 9

Obligations of beneficiary's bank

(1) The beneficiary's bank is, upon acceptance of a payment order, obligated to place the funds at the disposal of the beneficiary, or otherwise to apply the credit, in accordance with the payment order and the law governing the relationship between the bank and the beneficiary.

(2) When an instruction is received that appears to be intended to be a payment order but does not contain sufficient data to be a payment order, or being a payment order it cannot be executed because of insufficient data, but the sender can be identified, the beneficiary's bank shall give notice to the sender of the insufficiency, within the time required by article 10.

(3) When the beneficiary's bank detects that there is an inconsistency in the information relating to the amount of money to be transferred, it shall, within the time required by article 10, give notice to the sender of the inconsistency if the sender can be identified.

(4) When the beneficiary's bank detects that there is an inconsistency in the information that identifies the beneficiary, it shall, within the time required by article 10, give notice to the sender of the inconsistency if the sender can be identified.

(5) Unless the payment order states otherwise, the beneficiary's bank shall, within the time required for execution under article 10, give notice to a beneficiary who does not maintain an account at the bank that it is holding funds for his benefit, if the bank has sufficient information to give such notice.

Article 10

Time for receiving bank to execute payment order and give notices

(1) In principle, a receiving bank is required to execute the payment order on the banking day it is received. However, if it does not, it shall do so on the banking day after the order is received, unless

(a) a later date is specified in the order, in which case the order shall be executed on that date, or

(b) the order specifies a date when the funds are to be placed at the disposal of the beneficiary and that date indicates that later execution is appropriate in order for the beneficiary's bank to accept a payment order and execute it on that date.

(1 bis) If the receiving bank executes the payment order on the banking day after it is received, except when complying with subparagraph (a) or (b) of paragraph (1), the receiving bank must execute for value as of the day of receipt.

(1 ter) If a receiving bank accepts a payment order only by virtue of article 6(2)(e), it must execute for value as of the day on which

(a) where payment is to be made by debiting an account of the sender with the receiving bank, there are sufficient funds available in the account to pay for the payment order, or

(b) where payment is to be made by other means, payment has been made.

(2) A notice required to be given under article 7(4) or (5) or article 9(2), (3) or (4) shall be given on or before the banking day following the end of the execution period.

(3) Deleted

(4) A receiving bank that receives a payment order after the receiving bank's cut-off time for that type of payment order is entitled to treat the order as having been received on the next day the bank executes that type of payment order.

(5) If a receiving bank is required to perform an action on a day when it does not perform that type of action, it must perform the required action on the next day it performs that type of action.

(6) For the purposes of this article, branches and separate offices of a bank, even if located in the same State, are separate banks.

Article 11

Revocation

(1) A payment order may not be revoked by the sender unless the revocation order is received by a receiving bank other than the beneficiary's bank at a time and in a manner sufficient to afford the receiving bank a reasonable opportunity to act before the actual time of execution or the beginning of the day on which the payment order ought to have been executed under subparagraph (a) or (b) of article 10(1), if later.

(2) A payment order may not be revoked by the sender unless the revocation order is received by the beneficiary's bank at a time and in a manner sufficient to afford the bank a reasonable opportunity to act before the time the credit transfer is completed or the beginning of the day when the funds are to be placed at the disposal of the beneficiary, if later.

(3) Notwithstanding the provisions of paragraphs (1) and (2), the sender and the receiving bank may agree that payment orders issued by the sender to the receiving bank are to be irrevocable or that a revocation order is effective only if it is received by an earlier point of time than provided in paragraphs (1) and (2).

(4) A revocation order must be authenticated.

(5) A receiving bank other than the beneficiary's bank that executes, or a beneficiary bank that accepts, a payment order in respect of which an effective revocation order has been or is subsequently received is not entitled to payment for that payment order. If the credit transfer is completed, the bank shall refund any payment received by it.

(6) If the recipient of a refund is not the originator of the credit transfer, it shall pass on the refund to the previous sender.

(6 bis) A bank that is obligated to make a refund to its sender is discharged from that obligation to the extent that it makes the refund direct to a prior sender. Any bank subsequent to that prior sender is discharged to the same extent. This paragraph does not apply to a bank if it would affect the bank's rights or obligations under any agreement or any rule of a funds transfer system.

(6 ter) An originator entitled to a refund under this article may recover from any bank obligated to make a refund hereunder to the extent that the bank has not previously refunded. A bank that is obligated to make a refund is discharged from that obligation to the extent that it makes the refund direct to the originator. Any other bank that is obligated is discharged to the same extent.

(7) If the credit transfer is completed but a receiving bank executes a payment order in respect of which an effective revocation order has been or is subsequently received, the receiving bank has such rights to recover from the beneficiary the amount of the credit transfer as may otherwise be provided by law.

(8) The death, insolvency, bankruptcy or incapacity of either the sender or the originator does not of itself operate to revoke a payment order or terminate the authority of the sender.

(8 bis) The principles contained in this article apply to an amendment of payment order.

(9) For the purposes of this article, branches and separate offices of a bank, even if located in the same State, are separate banks.

CHAPTER III. CONSEQUENCES OF FAILED, ERRONEOUS OR DELAYED CREDIT TRANSFERS

Article 12

Assistance

Until the credit transfer is completed, each receiving bank is under a duty to assist the originator and each subsequent sending bank, and to seek the assistance of the next receiving bank, in completing the banking procedure of the credit transfer.

Article 13

Refund

(1) If the credit transfer is not completed, the originator's bank is obligated to refund to the originator any payment received from it, with interest from the day of payment to the day of refund. The originator's bank and each subsequent receiving bank is entitled to the return of any funds it has paid to its receiving bank, with interest from the day of payment to the day of refund.

(2) The provisions of paragraph (1) may not be varied by agreement except when a prudent originator's bank would not have otherwise accepted a particular payment order because of a significant risk involved in the credit transfers.

(3) A receiving bank is not required to make a refund under paragraph (1) if it is unable to obtain a refund because an intermediary bank through which it was directed to effect the credit transfer has suspended payment or is prevented by law from making the refund. A receiving bank is not considered to have been directed to use the intermediary bank unless the receiving bank proves that it does not systematically seek such directions in similar cases. The sender that first specified the use of that intermediary bank has the right to obtain the refund from the intermediary bank.

(4) A bank that is obligated to make a refund to its sender is discharged from that obligation to the extent that it makes the refund direct to a prior sender. Any bank subsequent to that prior sender is discharged to the same extent. This paragraph does not apply to a bank if it would affect the bank's rights or obligations under any agreement or any rule of a funds transfer system.

(5) An originator entitled to a refund under this article may recover from any bank obligated to make a refund hereunder to the extent that the bank has not previously refunded. A bank that is obligated to make a refund is discharged from that obligation to the extent that it makes the refund direct to the originator. Any other bank that is obligated is discharged to the same extent.

Article 14

Correction of underpayment

If the amount of the payment order executed by a receiving bank is less than the amount of the payment order it accepted, it is obligated to issue a payment order for the difference.

Article 15

Restitution of overpayment

If the credit transfer is completed, but the amount of the payment order executed by a receiving bank is greater than the amount of the payment order it accepted, it has such rights to recover the difference from the beneficiary as may otherwise be provided by law.

Part II. Text of articles 16 to 18 as they resulted from the work of the Working Group on International Payments at its twenty-second session

(The text of those articles was not considered by the Commission at its twenty-fourth session.)

Article 16

Liability and damages

(1) A receiving bank other than the beneficiary's bank is liable to the beneficiary for its failure to execute its sender's payment order in the time required by article 10(1), if the credit transfer is completed under article 17(1). The liability of the receiving bank shall be to pay interest on the amount of the payment order for the period of delay caused by the receiving bank's failure. Such liability may be discharged by payment to its receiving bank or by direct payment to the beneficiary.

(2) If a receiving bank that is the recipient of interest under paragraph (1) is not the beneficiary of the transfer, the receiving bank shall pass on the benefit of the interest to the next receiving bank or, if it is the beneficiary's bank, to the beneficiary.

(3) A receiving bank other than the beneficiary's bank that does not give a notice required under article 7(3), (4) or (5) shall pay interest to the sender on any payment that it has received from the sender under article 4(6) for the period during which it retains the payment.

(4) A beneficiary's bank that does not give a notice required under article 9(2) or (3) shall pay interest to the sender on any payment that it has received from the sender under article 4(6), from the day of payment until the day that it provides the required notice.

(5) A receiving bank that issues a payment order in an amount less than the amount of the payment order it accepted shall, if the credit transfer is completed under article 17(1), be liable to the beneficiary for interest on any part of the difference that is not placed at the disposal of the beneficiary on the payment date, for the period of time after the payment date until the full amount is placed at the disposal of the beneficiary. This liability applies only to the extent that the late payment is caused by the receiving bank's improper action.

(6) The beneficiary's bank is liable to the beneficiary to the extent provided by the law governing the relationship between the beneficiary and the bank for its failure to perform one of the obligations under article 9(1) or (5).

(7) The provisions of this article may be varied by agreement to the extent that the liability of one bank to another bank is increased or reduced. Such an agreement to reduce liability may be contained in a bank's standard terms of dealing. A bank may agree to increase its liability to an originator or beneficiary that is not a bank, but may not reduce its liability to such an originator or beneficiary.

(8) The remedies provided in this law do not depend on the existence of a pre-existing relationship between the parties, whether contractual or otherwise. These remedies shall be exclusive, and no other remedy arising out of other doctrines of law shall be available except any remedy that may exist when a bank has improperly executed a payment order or failed to execute a payment order (a) with the intent to cause loss, or (b) recklessly and with knowledge that loss might result.

CHAPTER IV. COMPLETION OF CREDIT TRANSFER AND DISCHARGE OF OBLIGATION

Article 17

Completion of credit transfer and discharge of obligation

(1) A credit transfer is completed when the beneficiary's bank accepts the payment order. When the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it.

(2) If the transfer was for the purpose of discharging an obligation of the originator to the beneficiary that can be discharged by credit transfer to the

account indicated by the originator, the obligation is discharged when the beneficiary's bank accepts the payment order and to the extent that it would be discharged by payment of the same amount in cash.

(3) A credit transfer shall be considered complete notwithstanding that the amount of the payment order accepted by the beneficiary's bank is less than the amount of the originator's payment order because one or more receiving banks have deducted charges. The completion of the credit transfer shall not prejudice any right of the beneficiary under the applicable law to recover the amount of those charges from the originator.

CHAPTER V. CONFLICT OF LAWS

Article 18

Conflict of laws

(1) The rights and obligations arising out of a payment order shall be governed by the law chosen by the parties. In the absence of agreement, the law of the State of the receiving bank shall apply.

(2) The second sentence of paragraph (1) shall not affect the determination of which law governs the question whether the actual sender of the payment order had the authority to bind the purported sender for the purposes of article 4(1).

(3) For the purposes of this article,

(a) where a State comprises several territorial units having different rules of law, each territorial unit shall be considered to be a separate State, and

(b) branches and separate offices of a bank in different States are separate banks.

ANNEX II

List of documents before the Commission at its twenty-fourth session

A. General series

A/CN.9/340	Provisional agenda
A/CN.9/341	Report of the Working Group on International Payments on the work of its twenty-first session
A/CN.9/342	Report of the Working Group on International Contract Practices on the work of its fourteenth session
A/CN.9/343	Report of the Working Group on the New International Economic Order on the work of its twelfth session
A/CN.9/344	Report of the Working Group on International Payments on the work of its twenty-second session
A/CN.9/345	Report of the Working Group on International Contract Practices on the work of its fifteenth session
A/CN.9/346	Comments on the Draft Model Law on International Credit Transfers
A/CN.9/347 and Add.1	Model Law on International Credit Transfers: Compilation of comments by Governments and international organizations
A/CN.9/348	ICC INCOTERMS 1990
A/CN.9/349	United Nations Decade of International Law
A/CN.9/350	Electronic Data Interchange
A/CN.9/351	Training and assistance
A/CN.9/352	Current activities of international organizations related to the harmonization and unification of international trade law
A/CN.9/353	Status of conventions
A/CN.9/354	Bibliography of recent writings related to the work of UNCITRAL

B. Restricted series

A/CN.9/XXIV/CRP.1 and Add.1-17	Draft report of the United Nations Commission on International Trade Law on the work of its twenty-fourth session

A/CN.9/XXIV/CRP.2	Proposal of Finland and the United Kingdom of Great Britain and Northern Ireland: articles 2 and 2 *bis*
A/CN.9/XXIV/CRP.3	Proposal of Ad Hoc Drafting Group of Finland, Singapore, the United Kingdom of Great Britain and Northern Ireland and the United States of America: article 1
A/CN.9/XXIV/CRP.4	Text adopted by the Commission: article 2(n)
A/CN.9/XXIV/CRP.5 and Add.1 and Add.2/Rev.1	Preliminary Report of the Drafting Group
A/CN.9/XXIV/CRP.6	Proposal of Switzerland and the United States of America: article 10(1) and (1)(*bis*)
A/CN.9/XXIV/CRP.7	Proposal of Canada, Singapore, the United Kingdom of Great Britain and Northern Ireland and the United States of America: article 6(3) and (4)
A/CN.9/XXIV/CRP.8	Proposal by the United Kingdom of Great Britain and Northern Ireland: article 7(5)
A/CN.9/XXIV/CRP.9	Proposal by the United Kingdom of Great Britain and Northern Ireland: article 9(4)
A/CN.9/XXIV/CRP.10	Proposal by the United Kingdom of Great Britain and Northern Ireland: article 16
A/CN.9/XXIV/CRP.11	Proposal by Mexico on an article concerning completion of the sense of the Model Law by analogy
A/CN.9/XXIV/CRP.12	Report of the Drafting Group

C. Information series

A/CN.9/XXIV/INF.1/Rev.1	List of participants

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